Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

In re Johnita F. Steinhilber,

Petitioner,

v.

Michael S. McFarland, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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111 pp

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DEPRIVED OF A FULL, FAIR AND IMPARTIAL SEVENTH AMENDMENT JURY TRIAL BY THE DISTRICT COURT MAKING PRETRIAL ORDERS BASED UPON FINDINGS OF FACT IT MADE PRIOR TO TRIAL BY JURY.

II. WHETHER IT WAS AN ERROR AND ABUSE OF DISCRETION FOR THE COURT TO RELY ON CONTROVERTED ALLEGED "STIPULATIONS" IMPROPERLY FILED BY RESPONDANTS/PLAINTIFFS MORE THAN FOURTEEN YEARS PRIOR, AND WITHOUT ASSENT OF PETITIONER OR HER THEN-ATTORNEY, AS THE BASIS FOR ITS PRE-JURY TRIAL ORDERS PRECLUDING PETITIONER FROM PRESENTATION OF TESTIMONY AND EVIDENCE AND ARGUMENT TO THE JURY, AND PROHIBITING CONSIDERATION OF DEFENSIVE MATTERS BY THE JURY.

III. WHETHER THE DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT AGAINST PETITIONER 156 DAYS AFTER ARGUMENT ON THE MOTION WAS ERRONEOUS, INASMUCH AS IT WAS BASED UPON

THE COURT'S PRE-JURY TRIAL FINDINGS OF FACT, AND VIOLATED RULE 56(c), F.R.C.P.

IV. WHETHER PETITIONER WAS DEPRIVED OF A FULL, FAIR AND IMPARTIAL SEVENTH AMENDMENT JURY TRIAL BY THE DISTRICT COURT INSTRUCTING THE JURY THAT THEY WERE BOUND BY DETERMINATIONS (FINDINGS OF FACT) ALREADY MADE (TO-WIT: THOSE MADE BY THE DISTRICT COURT PRIOR TO JURY TRIAL), AND BY BARRING PRESENTATION BY PETITIONER OF TESTIMONY AND DOCUMENTARY EVIDENCE TO THE JURY TO REFUTE THE FINDINGS OF THE DISTRICT COURT.

V. WHETHER THE DISTRICT COURT VIOLATED THE RULE OF LAW ESTABLISHED BY THE SUPREME COURT IN BEACON THEATRES, INC. v. WESTOVER, 359 U. S. 500 (1959), AND THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN BROWNLEE v. YELLOW FREIGHT SYSTEM, INC., 921 F.2d 745 (1990), REQUIRING TRIAL OF ALL ISSUES TO THE JURY, LEGAL BEFORE EQUITABLE.

VI. WHETHER PETITIONER WAS DEPRIVED OF AN ADEQUATE/PROPER REVIEW AT THE CIRCUIT COURT OF APPEALS LEVEL BY REASON OF THE EIGHTH CIRCUIT COURT RULING THAT SHE DID NOT SUBMIT NECESSARY TRANSCRIPT (TRANSCRIPTS OF THE ENTIRE DISTRICT COURT PROCEEDINGS), WHEN, IN FACT, THE RECORD UP FOR REVIEW INCLUDED SEVERAL THOUSAND PAGES OF TRANSCRIPTS AND DOCUMENTS WHICH PROVIDED THE COURT WITH MORE THAN AMPLE DOCUMENTATION TO ADEQUATELY ADDRESS THE MATTERS WHICH PETITIONER APPEALED.

LIST OF PARTIES

Johnita F. Steinhilber, Petitioner; Robert V. Steinhilber, Co-defendant; Winnebago South, Inc., a Missouri Corporation, Co-defendant; Michael S. & Donna C. McFarland, Roger F. & Cherly Morgan, Norman R. & Phillis A. Cates, Wayne E. & Annabell Laslay, Richard A. & Bonnie L. LaPointe, Glen G. & Opal Pittman, G. H. & Harriett L. Ricker, Orson A. & Glenna M. Rau, Gary & Carolyn Sue Spears, Paul & Juanita L. Schafer, Robert J. & Anna E. Schumacher, Christ & Sophia Skiroitis, S. N. & Irene P. Whitcanack, Arthur & Kathleen Zago, Respondents.

CORPORATE DISCLOSURE

There are no parent corporations involved, and there are no publicly held companies involved, only the privately held corporation, Winnebago South, Inc.

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I.. A United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important matter; and

II. Has so departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power

III. A United States District Court and

a United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court

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OPINIONS BELOW

The Opinion of the Eighth Circuit panel is recited on App. 1.

The Order of the Clerk of the Eighth Circuit panel denying rehearing is recited on App. 2.

The District Court's "Judgment In A Civil Case" stating part of the "Judgment" was based upon "Jury Verdict" and part on "Decision by Court" and stating the "facts" it found prior to jury trial in regard to Petitioner's husband, which the Court instructed the jury were binding upon them, and which the Court prohibited Petitioner from contradicting and presenting evidence or argument to the jury, is recited on App. 3. (Page 1 only, which states all pertinent parts of "Judgment", is recited.)

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on August 11, 1999. A timely Petition for Rehearing was filed and the Order denying the Petition was entered September 16, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The SEVENTH AMENDMENT to the UNITED STATES CONSTITUTION is involved. It states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Title XIV, Public Law 90-448, Laws Of 90th Congress - 2nd Session, is also involved in this case. It was the initial "Interstate Land Sales Full Disclosure Act" (ILSA) and became effective April 28, 1969. It differs materially from subsequent amendments. It was subsequently identified as 15 U.S.C. §§ 1701-1720, and both designations are used in this Petition. The District Court referred to both designations on occasion.

Section 1402(4)/1701(4) states:

> " 'developer' means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;"

Section 1402(5)/1701(5) states:

> " 'agent' means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services."

(There is no provision for what the District Court described as a "fraudulent profit maker" in its findings of facts in the initial ILSA Law.)

§ 1410/1709 is entitled 'CIVIL LIABILITIES".

§ 1410(e)/1709(e) states:

> "In no case shall the amount recoverable under this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs."

Section 1420(a)/1719(a) states:

> "The district courts of the United States . . . . shall have jurisdiction of offenses and violations under this title . . . . . "

STATEMENT OF THE CASE

Petitioner holds a note and deed of trust from Winnebago South, Inc. (WSI) on the Lake Winnebago Retirement Village Subdivision (Winnebago South) in Cass County, Missouri, as a result of selling the subdivision to WSI on February 6, 1969. She had purchased the land (a farm) a year before and had subdivided it and made substantial development improvements on it before the sale. In December, 1971, Respondents'/Plaintiffs' Counsel filed a class action lawsuit in U. S. District Court, Western District of Missouri, claiming jurisdiction under the Interstate Land Sales Full Disclosure Act (ILSA) which became effective April 28, 1969. The suit named WSI, who was then engaged in developing the subdivision, her husband (who was CEO and sole stockholder of WSI), Grandview Bank, numerous other defendants, and Petitioner.

The ILSA imposed liability for misrepresentation or omission of material facts in connection with the sale of lots covered by its provisions. The liability could attach to a developer or its agents who were directly or indirectly engaged in sales. The Act required the filing a statement of record and a property report with the ILSA Office. Petitioner's note and deed of trust were recorded and stated in all filings with the ILSA.

The case was certified as a class action in 1972. In 1980, an Order omitted persons who purchased lots before April 28, 1969 and after October 22, 1971. WSI voluntarily ceased making sales in August, 1971, due to events beyond its control. A receiver was appointed in 1972, and after his death, his son, the current Receiver was appointed.

On March 11, 1981, the initial judge in the matter issued a "Final Pretrial Order" setting forth an agenda. In accordance with the agenda, counsel held conferences to determine uncontroverted facts and to propose to the Court an agenda for further pretrial proceedings. However, the agenda set forth by the Court in its March 11, 1981 Order was never accomplished by

the various counsels, nor did Respondents'/Plaintiffs' Counsel submit an Agreed Final Pretrial Order by June 30, 1981, in accordance with the Court's Order of June 5, 1981, which Order was in response to said Counsel's Motion for an extension of time in which to file the Agreed Final Pretrial Order. Instead, said Counsel filed another draft agenda extending to indefiinate future dates completion of the existing "Final Pretrial Order" of March 11, 1981, and filed with that pleading a document styled "Final Pretrial Brief of the Parties" which purported to be a list of agreed stipulated facts. No other counsel signed these documents or were notified of the filing.

No further proceedings took place under the initial judge, and on January 21, 1982, the case was transferred to a second judge. On June 30, 1983, the case was administratively dismissed for failure to prosecute and a JS-6 card issued. No other activety appeared until November 29, 1985, when defendant Grandview Bank filed a Motion To Dismiss For Failure To Prosecute, and asked in the alternative for a summary judgment. Their Motion was denied on March 18, 1986.

The new/second judge issued several orders which attempted to get the various counsel to "enter into and agree upon stipulations of fact", to no avail. Respondents'/Plaintiffs' Counsel admitted in a letter to the Judge on May 31, 1985 that no agreement as to stipulations had been made. The new/second judge died and the case was assigned to the current/third judge on July 25, 1991.

On September 12, 1991, the Court ordered the Receiver to attend a litigation status conference on October 1, 1991. On September 26, 1991, the conference was cancelled and the Receiver was ordered to provide the Court with a written litigation status report by October 25, 1991. On October 25, 1991, Respondents'/Plaintiffs' Counsel sent an ex parte letter to the Court on behalf of the Receiver, representing that he was attorney for the Receiver in addition to being at-

torney for Plaintiffs.

On November 27, 1991, The Court issued an Order setting a status conference for February 21, 1992 to discuss "the matters discussed in plas' class counsel's 10/25/91 letter to me".

The attorney for Winnebago South, Inc. (WSI) had been acting as attorney for Petitioner and her co-defendant husband, Robert V. Steinhilber. He had also been appointed as "liaison counsel" for all defendants by the Court in June, 1980.

No notice of the February 21, 1992 conference was sent to Petitioner or her husband. However, at that conference it was decided that WSI's attorney would cease acting as attorney for Petitioner and her husband - "withdraw". (See 2/21/92 Memorandum from Judge Bartlett to his secretary, App. 10.)

On February 28, 1992, WSI's attorney filed a Motion To Withdraw as attorney of record for Petitioner and her husband, which was the first they knew of any such intention.

On March 4, 1992, the Court issued a Show Cause Order requiring Petitioner and her husband to show cause why WSI's attorney should not be allowed to withdraw as attorney of record for each. Each responded. On April 8, 1992, the Court approved the withdrawal. The Court advised Petitioner and her husband that they would either have to hire an attorney or proceed pro se. A telephone conferwas held at which the Judge stated he was going to "get rid of this case one way or another".

The initial judge had denied a motion that the the Court cancel Petitioner's mortgage note and deed of trust, stating the Receiver should file a lawsuit to do so if that was what was wanted. This was not done during the nineteen years which transpired. On June 9, 1992, the current judge issued a Show Cause Order requiring Petitioner and her husband to

show cause why the note and deed of trust should not be cancelled. Each made response pro se, due to not being able to afford an attorney. Hearings were held. On September 13, 1994, the Court issued an an Order cancelling the note and deed of trust. Petitioner and her husband objected strenuously, to no avail.

Prior to that Order, on July 19, 1994, the Court issued an Order binding Petitioner and her husband to the "Pretrial Brief of the Parties" which had been filed by Respondents'/Plaintiffs' Counsel back on June 30, 1981, and which even said Counsel admitted had not been agreed to by counsel for the various parties. Petitioner and her husband objected strenuously, to no avail.

(See ¶ 2) and ¶ 3) of App. 3m - "Judgment", and App. 8 and App. 9.)

On April 4, 1995, the Court issued an Order setting the case for trial on November 13, 1995. Settlement and pretrial conferences were held.

On November 3, 1995, being 156 days after argument on the matter and on the eve of the trial itself, the Court granted Respondents'/Plaintiffs' Motion for Partial Summary Judgment against Petitioner. At that time, the Court also ruled that "2) as a matter of law, Johnita Steinhilber was an 'agent' of developer WSI until 11/7/69, when Sales Management Co. no longer acted as a sales agent for lots in Winnebago South; 3) as a matter of law, Johnita Steinhilber was a developer of Winnebago South after 4/23/71; and 4) as a matter of law, Johnita Steinhilber was a 'fraudulent profit maker' <u>for purposes of the ILSA</u> *at all times after 2/6/69, when she conveyed the Williams Farm to WSI." (Emph. added.) The Court purported to act under Rule 56(c), F.R.C.P.

(Petitioner's note: The Rule required the Court to find "there (were) no genuine issues of material fact", but instead, the Court entered findings of fact and

conclusions of law and erroneously, without citation, asserted right available only under Rule 56(d) to hold the facts so found binding on the jury at trial. Rachal v. Hill, 235 F. 2d 59 (5th Cir. 1970.)

There was no provision or reference to a "fraudulent profit maker" in initial ILSA Law. Central Bank v. First Internat'l. Bank, 128 L. Ed. 119 (S.Ct. 1994.)

The Court was obviously very reluctant to have a jury hear the case. Both Petitioner and her husband, as well as the only other defendant to be involved in the trial (Grandview Bank) and Respondents/Plaintiffs, had initially all asked for jury trial. However, at that point, the Court vacillated on whether to have a jury, and if so, whether that jury should merely be an advisory jury. Again, at that point, Respondents/Plaintiffs argued against a jury, or at least anything other than an advisory jury - that they were satisfied to have the Court hear the case without any jury. Petitioner filed a Petition for a Writ of Mandamus to require a Seventh Amendment jury trial with the United States Court of Appeals for the Eighth Circuit, which Petition was denied, but after said filing, the District Court ruled Petitioner, her husband, and Grandview Bank were entitled to a jury trial, but stated it would not necessarily be bound by its findings. (P. 91, 11-8-95 Transcript before 8th Cir. Ct.)

On November 9, 1995, the Court granted Respondents/Plaintiffs' Motion for a bifurcated trial, with liability issues determined first and damages issues to be determined secondarily. Petitioner and her husband objected. Objection was also made to violation of the Seventh Amendment jury trial rights by the District Court's Order prohibiting and precluding defendants from presenting testimony and other evidence controverting the Court's findings on the separate legal and equitahble issues usurped from the jury, while allowing offensive use of the findings of fact by Respondents/Plaintiffs during trial.

On November 9, 1995, also, the Court granted

Respondents'/Plaintiffs' Motion for Summary Judgment against WSI.

Jury trial began on November 16, 1995 and continued for 28 days, on which day, February 13, 1996, the jury rendered its verdicts. (See App. 3a-3e, noting Verdict J.)) (Jury had taken a break.)

Immediately after the jury verdicts the District Court ordered submission of briefs by the parties on "The Effect To Be Given To The Jury Verdicts" in which Respondents/Plaintiffs argued that the jury in this case could only be an advisory jury, and that there was no statutory or constitutional right to a jury trial with respect to the "purely equitable" claims.

On March 25, 1997, a telephone conference was held, and 1) the then (successor) lead attorney for Respondents/Plaintiffs asked to be relieved from his representation of Plaintiffs, and 2) his law firm asked to be relieved of the representation due to having dissolved approximately three months prior. During the conference, the Court told the lead attorney that "you should have won" (referring to the jury verdict in favor of Grandview Bank and possibly the verdict in favor of Petitioner on the Count of conspiracy*) - that "all the best prognosticators thought you would win", but as in a basketball game, its sometimes hard to predict. The initial lead attorney for Respondents/Plaintiffs had once stated to Petitioner, her husband, and the Court-appointed liaison attorney, that his law firm had filed the case to gain experience in the then (1971) developing class action lawsuit litigation.

(* Petitioner's note: In fact, although the charges against Petitioner were exactly the same as against Grandview Bank, the Court's instructions to the jury were such that on the only verdict where jury was free to decide for itself, it found in favor of her.) (See App. 3a thru 3e, noting Verdict J.)

Judgment was entered March 14,1997. Petitioner duly filed Notice of Appeal and other required pleadings and paid fees, all on a timely basis.

The case was submitted to the three-judge panel of the Eighth Circuit of Appeals on Friday, August 6, 1999. Under the Court's Rules for Pro Se cases, it was to be reviewed on the basis of entire District Court record. That record of this almost 28 year old case consisted of 111 pages of legal-size docket sheets, 254 pages of deputy court clerk minute sheets, many dozens of pages of Court orders, many thousands of pages of pleadings, and hundreds of pages of exhibits. The Opinion of the three-judge panel based in three different locations hundreds of miles apart was filed on Wednesday, August 11, 1999. It consisted of a two-sentence affirmation of the District Court's Judgment. (App. 1.)

Petitioner's Petition for a rehearing was denied without comment. The denial was in the form of a notice from the Clerk of the Court dated September 16, 1999. (App. 2.)

Whereupon, Petitioner files this Petition on November 10, 1999.

REASONS FOR GRANTING WRIT

In Regard To "Questions Presented" I

The landmark case on this question was settled and the right to a Seventh Amendment jury trial defined in Beacon Theatres, Inc. v. Westover, U. S. District Judge, 359 U.S. 500 (1959).

At the very core of the decision in Beacon was a determination to protect the right of citizens to a full and fair jury trial as protected by the Seventh Amendment to the Constitution and Rule 38(a) of the F.R.C.P.

Justice Black, writing the opinion, concludes that, in actions where both issues of law and equity were claimed by the parties, and based on a common set of facts, it

would be an untenable deprivation of that Constitutional right were district court judges allowed to bench try the issues separately, and the greatest danger lay in a court determination of an equitable issue which could foreclose a fair jury trial on legal issues by acting as "res judicata or collateral estoppel to conclude both parties" in jury trial of the legal issues. 359 U.S. at 504.

In Beacon, Fox, the prospective defendant in an anticipated anti-trust action by Beacon, sought a Declaratory Judgment of exoneration. The district court interpreted it as a request for injunctive relief. The Supreme Court in Beacon stated the district court purported "to act in the exercise of its discretion under Rule 42(b) to try any claim or issue separately in furtherance of convenience, avoidance of prejudice, or expedition and economy."

The Beacon Court held that, under remedies now available under the F.R.C.P., "the use of discretion by the trial court, under Rule 42(b) to deprive petitioner of full jury trial of the issues in the anti-trust (legal) controversy cannot be justified". 359 U.S. at 508.

The Eighth Circuit panel therefore is in conflict with the decision of the Supreme Court and the Eighth Circuit Court in upholding the District Court's ruling on the equitable issue prior to jury trial contrary to the Beacon holding that the Ninth Circuit Court had improperly denied petitioner's application for a writ of mandamus requiring the district court to set aside its ruling. Further, the Eighth Circuit Court itself had improperly denied Petitioner's November 9, 1995 Petition for Writs of Mandamus and Prohibition asking for vacating of improper pretrial orders already made and a mandate to accord a jury trial on all issues to all defendants. (11-20-95 Docket Entry # 421.) (Also see Petitioner's Reply Brief to the Eighth Circuit Court on 11-25-98.)

In Beacon, the Supreme Court stated that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

In this case, after the original District Court Judge rejected the original Receiver's motion for summary cancellation of Petitioner's note and deed of trust, more than 23 years later, the current District Court Judge cancelled privately held property interest which had vested before the ILSA ever became effective.

The District Court did not rely on Rule 42(b) in this case, the Beacon Court having rejected a right to separate trial of legal and equitable issues where jury rights are involved. After Beacon, the Rule was amended to add the language "always preserving inviolate the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

In Beacon, the Ninth Circuit Court construed the complaint by Fox to include a request for an injunction against threats of lawsuits which, as the basis of injunctive relief in the federal courts, had always been based on a potential for irreparable harm and an inadequacy of legal remedies, which traditionally have justified equitable jurisdiction. 359 U.S. at 506. The Supreme Court stated that "at least as much is required to justify a trial court in using its discretion under the Federal rules to allow claims of equitable origin to be tried ahead of legal ones". 359 U.S. at 507.

In this case, no "imperative circumstances" were cited by the District Court - nor were there any. All of Petitioner's rights under her note and deed of trust to collect principal and interest, to foreclose, or to sell or assign her interests had been frozen and enjoined by the District Court when this suit was filed. This status quo never altered before trial.

As to the reference to "final determination" of the facts, in this case, although the District Court denied certification of these violations of jury trial rights, and the Eighth Circuit Court in every instance held them interlocutory, the District Court in final pretrial conference said: "I say it is final for purposes of this trial." (Transcript of 11-20-95, pp. 30-35, at 34, ll 17-18, Eighth Circuit appeal Exhibit # 51-56, Exhibit Book I.)

The Eighth Circuit Court failed to address the District Court's flagrant and unexplained violations of the rule of law expressed in Beacon and by its own Circuit Court in Brownlee v. Yellow Freight System, Inc. 921 F. 2d 745 (8th Cir. 1990), and Granfinancier, S.A., et al. v. Norberg 492 U.S. 33, 106 L. Ed. 2d 109 (1989).

The actions of this District Court were, without reference to the credibility of any witness at trial, clearly in conflict with the rule of law of Beacon, et al., and Brownlee and in conflict with the F.R.C.P Rule 38(a) and Rule 42(b) in the matter of preserving - not violating - the right to a Seventh Amendment jury trial. The violations were apparent from the record and required review.

The assertion of the Eighth Circuit Court that Respondents'/Plaintiffs' action was an equitable matter asking only rescission is contrary to facts in the District Court record. Respondents'/Plaintiffs' eleventh hour conversion, urged by the District Court on the eve of trial, claiming relief sought was purely equitable, is rebutted by the legal nature of their three complaints filed under the ILSA, and the legal nature of the damages recoverable under the ILSA.

The Eighth Circuit Court failed to review the District Court's clear error of law, in that the Beacon Opinion expressly prohibited this kind of impairment of a jury trial right, citing back to the Supreme Court's earlier holding in Scott v. Neely, 140 U.S. 106, 109-110 (1891).

> "In the Federal courts this (jury) right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law, of a demand for equitable relief in aid of the legal action during its pendancy."
> (At 359 U.S. 510.)

The Respondents'/Plaintiffs' demand for cancellation of Petitioner's note and deed of trust was clearly a "demand for equitable relief in aid of the legal action," and as such, in conflict with the Supreme Court's controlling precedent.

The Supreme Court has held that the right of a bankruptcy trustee to recover an alleged fraudulent conveyance in 18th Century England was 1) legal rather than equitable, 2) could not be tried in an equity court, and 3) because a complete remedy is available at law in an action sounding in tort, the defendant corporation had a right to a jury trial. Grandfinanciera, S.A. v. Norberg, infra. And the question of whether parties are entitled to a jury trial cannot be determined solely on the basis of the allegations in the Complaint or in the form of relief sought. Klein v. Shell Oil Co., 386 F. 2d 659, 663 (8th Cir. 1967).

On November 8, 1995, and again on November 20, 1995, the District Court announced that "(T)here is going to be a jury trial in this case", but the Court reserved to itself a right to declare it an "advisory jury" only, after trial - "after consideration of whatever the jury comes up with, but not necessarily being bound by it." (Transcript of Trial Proceedings, 11-8-95, p. 91, ll 17-19, Book I of Petitioner's Exhibits to Brief to Eighth Circuit Court.)

Petitioner And Other Defendants Were Entitled To A Seventh Amendment Jury Trial Because All Of Respondents'/Plaintiffs' Claims Sought Damages For Common Law Conspiracy To Defraud, Deceit And Assumpsit.

The Supreme Court outlined a two-step analysis to determine whether a party has a right to a Seventh Amendment jury trial in Woodell v. Electrical Workers, 502 U.S. 93, 116 L. Ed. 2d 419, 112 S.Ct. 494 (1991).

"To determine whether a particular action will resolve legal rights, and therefore give rise to a jury trial right, we examine both the nature of the issues involved and the remedy sought. (Internal citations are omit-ted.) 'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.'" Ibid., citing Tull v. United States, 481 U. S. 412, 417-418, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987). The second

inquiry is the more important in our analysis. Terry, supra, at 565, 108 L. Ed. 2d 519, 110 S.Ct. 1339, Citing Granfinanciera, S. A. v. Norberg, 492 U.S. 33, 42, 106 L.Ed 2d 26, 109 S.Ct. 2782 (1989)."

The nature of the issues in this case track the statutory causes of action for misrepresentation and deceit in a conspiracy to defraud. So important was conspsiracy in claims for damages submitted to the jury that the Court refused a request by Grandview Bank to be severed from the trial because of potentially fatal prejudice to the jury as a result of Respondents'/Plaintiffs' repeated publication of language used by the Court in its Order cancelling Petitioner's note and deed of trust. The Court stated that Grandview Bank could not be severed because "conspiracy is an issue in the case."

With respect to Respondents'/Plaintiffs' claims that defendants engaged in a conspiracy or scheme to defraud, the Supreme Court has decided that a claim involving allegations of conspiracy to defraud could not be maintained in equity. In Curriden v. Middleton, 232 U. S. 633, 58 L. Ed. 2d 765, 34 S.Ct. 458 (1914), the Court held that where, as here, as a result of an alleged conspiracy to defraud, plaintiffs sought the return of monies paid and obligations incurred to persons other than the defendant, that the suit could not be maintained in equity. In Curriden, the relief prayed for was similar to the relief sought by Respondents/Plaintiffs; i. e., plaintiffs sought "a decree that the defendants 'shall make due restitution (of his property) to the complainant by paying to him the amounts of dollars by him paid out as aforesaid.'" 232 U.S. at 636. The Court held that this relief was damages, not restitution as characterized by the plaintiffs. (See also National Union Electric Corporation v. Wilson, 434 F. 2d 986 (6th Cir. 1970) (reversing district court for failing to grant a Seventh Amendment jury trial in an action for conspiracy to defraud).

The claims against Petitioner, exactly the same counts as were charged to the jury against Grandview Bank, are analogous to common law claims for conspiracy to defraud, deceit, and assumpsit. Prior to the merger of law

and equity, these claims would have been brought in the common law courts of 18th century England because an adequate remedy existed at law.

Conclusion: The nature of the claims brought against all defendants in this case were actions at law, and the findings of fact are for a jury to determine.

The Remedy Sought By Respondents/Plaintiffs Was Not Equitable

In the second analysis required to determine whether a Seventh Amendment jury trial is required, the relief sought, Respondents/Plaintiffs sought compensatory and punitive damages. Although at the eleventh hour they decided to mischaracterize the relief sought as "rescission and restitution", it is inaccurate. Petitioner was not a party to any contracts with the Plaintiff class, and was not a vendor of the property sought to be returned. Nor was Petitioner the purchaser, assignee or owner of any installment notes from lot purchasers. In Curriden v. Middleton, supra, the Supreme Court held that the relief sought for monies paid and obligations incurred to parties other than the defendant was damages, not restitution.

The damagaes provided for in § 1709(c) in the initial ILSA are expfessly limited to the return of money spent, i. e., actual damages, and, in § 1709(e), Congress made explicit that whether plaintiffs chose to sue a developer either in law or in equity, "In no case" would the amount recoverable exceed the purchase price, reasonable costs of improvements and reasonable court costs."

In a recent Supreme Court decision construing right to a Seventh Amendment jury trial on the issue of statutory (variable) damages in a copyright infringement action, the Court concluded that, while the statute itself did not provide such a right on statutory damages, the "Seventh Amendment provides a right to jury trial on all issues pertinent to an award of damages under § 504(c), including the amount itself." Pp. 7-16 (of the Syllabus), Opinion, page 2. Feltner v. Columbia Pictures Television, Inc., No. 96-1768, reversing 106 F. 3d 284,

decided March 31, 1999, by unanimous decision.

In analyzing appropriateness of jury trial on damage issues, the Court reviewed two cases relied upon by the Eighth Circuit in its Brownlee decision, Teamsters v. Terry, 494 U.S. 558, 570-571 (1990) "We have recognized the 'general rule' that monetary relief is legal", and Curtis v. Loether, 415 U.S. 189, 196 (1989): "Actual damages are 'traditional forms of relief offered in the courts of law.' " (Feltner Syllabus at 12.)

The Brownlee Opinion states: "Those cases teach that the right to a jury trial in a statutory action ..... depends upon the presence of 'legal rights and remedies'." At 747. The Eighth Circuit Court was clearly in conflict with its own holdings in Brownlee and Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635 (8th Cir. 1996). (Right to Seventh Amendment jury trial on all issues, including damages. It was in conflict with other Circuits upholding Seventh Amendment jury trial as expressed in the many decisions of the Supreme Court cited in Feltner and other cases construing Seventh Amendment jury trial rights.

In the Cass County case, the Eighth Circuit Court held that either party in a copyright infringement suit is entitled under the Seventh Amendment to a jury trial on demand. It stated that the Court was satisfied that neither the determination of liability nor the assesment of damages in the ordinary copyright case is beyond the jury's ability.

As to Respondents'/Plaintiffs' claim for punitive damages in the sum of one million dollars, the Supreme Court in Feltner cited to its own determination in Tull v. United States, 481 U.S. 412, 422 (1987): "Remedies intended to punish culpable individuals ..... were issues by courts of law, not courts of equity." (Syllabus at 12.)

It is inarguable that holdings in the Supreme Court and the Eighth Circuit Court require a Seventh Amendment jury on the demand of either party, where, as in this case, claims are made and relief is sought which are both historically triable to a jury in courts of law.

It is also inarguable that Respondents/Plaintiffs chose to blend equitable claims of injunction, freezing of assets, rescission of lot purchasers' contracts and instruments of debt and appointment of a receiver, as incidental to the legal claims and legal remedies sought by them relying on the rights and remedies provided by statute under the ILSA. This brought this action squarely subject to the mandate issued by the United States Supreme Court in its 1959 decision in Beacon.

Cases which involve both legal and equitable issues in the same action, whether in claims, counterclaims or defenses involving the same set of facts, require a Seventh Amendment jury trial, and lower courts do not have authority or discretion to act as a court in equity to deprive parties of full and fair jury trial on all issues, both equitable and legal.

Respondents'/Plaintiffs' first and two amended complaints claimed jurisdiction under the ILSA, effective April 28, 1969. The first complaint was filed on December 23, 1971. A jury trial was demanded.

1. They alleged that all defendants engaged in a "concerted and secret* scheme and integrated transaction in selling lots by means of false representations". *("Secret" is Respondents'/Plaintiffs' embellishment.)

2. And a concerted device scheme and artifice to defraud Respondents/Plaintiffs through "transactions, practices, and a course of business which operates and has operated as a fraud and deceit upon" Respondents/Plaintiffs.

3. And defendants did make the aforementioned false representations with full knowledge that they were untrue, with fraudulent intent and in wanton disregard of their obligations under the ILSA and the common law. (See § 1703 (2) (A) (B) (c).)

The esssential element of Respondents'/Plaintiffs' claim at trial against the three defendants was the count of "Connspiracy To Defraud'. To preclude Petitioner and her husband from meaningful opportunity for defense,

neither the Respondents/Plaintiffs nor the Court would agree to sever Grandview Bank from trial, because that would destroy their usefulness in finding liability against Grandview Bank by exposition of the Court's "findings of fact" and they hoped for imputation to Grandview Bank.

Throughout the course of the action, Respondents/ Plaintiffs continued to pursue the damages recoverable under § 1709 (e) and § 1713, "Additional remedies:" They They also sought $1,000,000 punitive damages.

Jury Trial Demands And District Court's 11-8-95 Reneg.

On September 18, 1995, Respondents/Plaintiffs again sought a jury trial when they filed a Motion for a bifurcated trial, admitting that "it is certainly within the province of the jury to make a determination of the facts necessary to establish each of the issue of liability" but requested that the issue of damages be bifurcated from the jury's decision on liability.

On October 2, 1995, Petitioner filed a Memorandum in opposition to bifurcation of damage issue from jury trial. On November 9, 1995, in pretrial conference, the District Court granted the Motion for separate non-jury trial on damaages. On November 8, 1995, the Court first raised the possibility of trying the liability issues without a jury, or at the most, an advisory jury, and encouraged Respsondents/Plaintiffs to characterize their claim as "purely equitable", and the relief being sought as rescission. "Although", the Court stated, "there were both legal and equitable claims made in this case". The Court, however, maintained an ambiguous posture, stating: "..... although Plaintiffs characterize their remedy as rescissory (sic), it doesn't have some elements of legal damages to it. Clearly, this is not a case that is as, that is, can be decided based on just following what the Eighth Circuit or the Supreme Court of the United States has done in other cases because this one has some potentially complicating features to it that frankly have not been adequately handled." (Emphasis added.) (Transcript of proceedings, 11-8-95, page 14, included in Petitioner's Ex-

hibit Book before the Eighth Circuit Court panel.)

This is the nearest the District Court came to acknowledging that argument had even been made by defendants referring to precedent law established by the Supreme Court or the Eighth Circuit Court.

The District Court did not share any analysis distinguishing this case from other Seventh Amendment cases. Nor did the Eighth Circuit Court choose to construe it as a case of first impression. The only ambiguity appears to have been, rather, a device to avoid a controlling jury verdict favoring defendants.

The Court continued: "..... I am not, however, commiting at this point that I will, if I determine that it was an advisory jury, I obviously am not commiting that I will be following what the jury determines. ..... I will make that decision after consideration of whatever the jury comes up with, but not necessarily being bound by it." (Supra, prior quote: 11-8-95 Transcript, p. 91.)

The very nature of the claims in this case, as provided by statute and recited in Respondents'/Plaintiffs' complaints are traditional legal actions in tort as heard in the courts of law in Eighteenth Century England. They claimed in each count damages provided in § 1709, ILSA, plus punitive damages, also tried to courts of law. Their eleventh hour attempt to relabel this case as an action in in equity seeking the sole remedy of rescission, is, to say the least, an attempt by them and the Court to evade an adverse jury verdict, as was indeed the result where Grandview Bank was allowed to present testimony and and evidence on issues of fact common to the claim of conspiracy to defraud charged against all defendants.

In Grandfinanciera, the Supreme Court states:

> "Congress cannot divest petitioners of their Seventh Amendment right merely by relabeling a pre-existing common law cause of action to which that right attaches and assigning it to a speciallized court of equity." 106 L.Ed. 2d

26, at 36.

If Congress cannot divest Petitioner of a Seventh Amendment right by relabeling a pre-existing common law cause of action to which a jury trial right attaches, then neither should the District Court and Respondents/Plaintiffs in this case be privileged to do so.

Respondents/Plaintiffs chose to combine remedies traditionally equitable with claims made in statutory terms, asking for injunctive relief against WSI and all parties holding interests in instruments creating obligations on the part of lot purchasers (installment notes or other financing) restraint upon foreclosure by lienholders under blanket mortgages (Grandview Bank and Petitioner) and appointment of a temporary receiver (to hold assets and ensure continual development which neither Receiver ever attempted - chosing abandonment.)

Reasons In Regard To "Questions Presented" II

On July 19, 1994, the current District Court Judge ruled that Petitioner and her husband were bound by certain "facts", and could not present any testimony or other evidence to the jury contrary to those "facts". Those "facts" were merely allegations which Respondents'/Plaintiffs' former Counsel had made in a rogue pleading almost 14 years before. (Judgment, ¶ "2)", App. 3m.)

In doing so, the District Court deprived Petitioner of the jury trial demanded by the Beacon mandate and usurped the jury's right to be the triers of fact.

The District Court asserted Petitioner and her husband lost their rights allegedly because an attorney (the attorney) who had been acting on their behalf failed to "timely object" to an ex parte filed pleading by then lead counsel for Respondents/Plaintiffs. The pleading claimed to present to the Court stipulations of facts which allegly were agreed upon by said Counsel and the attorney.

In fact, there had been no such agreement. The attorney had consistently contested the "facts" alleged in

the rogue pleading in prior pleadings he had filed, and neither Petitioner nor her husband had ever agreed to or given the attorney permission to so agree on their behalf. The District Court record is clear on those facts. And it is clear also that subsequent to filing the rogue pleading, Respondents'/Plaintiffs' Counsel admitted in a letter to a successor (second) Judge that there was no agreement as to stipulated facts, and there had been no joinder by any defense attorney in filing the ex parte statement of alleged agreed facts. (App. 8 .) And, the the attorney testiified before the current Judge that there had been no agreement, which testimony was given before the Judge's July 19, 1994 ruling. (Transcript, 3-25-94, App. 9.)

(Petitioner's note: In a case just two years before (1992) the current judge stated: "Generally, admissions of fact made by counsel are binding upon their principals so long as they are unequivocal. (Internal cites omitted.) Where, however, doubt exists as to the purported admission, the issue may not be removed from the jury's consideration." (Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1267 (8th Cir.) 792 F. Supp. 1520, 1531 (W.D.Mo. 1992)).

It is vitally important for any reviewer to realize that the consequences of the Court's ruling was fatal to whatever degree of opportunity Petitioner had for receiving a full, fair and impartial Seventh Amendment jury trial.

The stipulation ruling was the foundation stone on which the District Court structured trial of this action to evade a jury as the trier of facts on all issues.

An analysis of the events which took place in 1981, as shown by District Court Docket Sheets which were part of the record before the Eighth Circuit Court panel, shows that Respondents'/Plaintiffs' then lead counsel did not follow/complete the requirements of a November 25, 1980 "Final Pretrial Order" issued by the first Judge. He did not file a pleading entitled "Plaintiffs' Reply Brief" on or before 2/20/81 as the Order required. After extensions of time and faced with a final deadline for submission of a new "Final Pretrial Order" to continue pretrial

proceedings, he instead filed a new, open-ended Agenda, along with a mislabeled "Pretrial Brief Of The Parties", and attached an unsigned document entitled "Statement of Facts Stipulated Among Plaintiffs And Defendant Winnebago South, Inc., Robert V. Steinhilber, Jack O. Hart, Bonnie Hart And Johnita Steinhilber".

The purpose of the Pretrial Order was to arrive at a Joint Statement of Contested and Uncontested Facts upon upon which to base a pretrial brief of the parties for a for a final pretrial conference. No such conference was ever held before either the first or the second Judge. Counsel's 6-30-81 filing simply continued to assert alleged facts which Petitioner's then attorney had consistently contested and labeled false and which Petitioner was entitled to have been reserved for jury trial.

The 11-25-81 Order by the first Judge, under which the current Judge stated he was holding Petitioner, et al., bound re the so-called stipulations, was a "form" Order from the Manual For Complex Litigation, Second. That Judge was on the Board of Editors of that publication. The Manual advised: "If relevant facts are in dispute, the Court should explore procedural devices for determining the relevant facts if it can be done without injustice on any party's right to a jury trial." (Part I, at 35.) It cannot reasonably be said, in view of this and the many precautions in the Manual against violating the right to a Seventh Amendment jury trial, that that first Judge ever intended that his procedure preclude a full, fair and impartial Seventh Amendment jury trial.

The entries on the District Court Docket Sheets which were before the Eighth Circuit Court panel showed that it was Respondents'/Plaintiffs' Counsel who was in violation of the 11-25-80, having failed to timely file a Reply Brief to Defendants. Petitioner's then attorney was not in violation. In addition, Rule 16 (e), F.R.C.P. calls for a Court Order to give record notice of "action taken" which "shall" control subsequent control of the action. No such order was issued.

Respondents'/Plaintiffs' Counsel was also in violation

of Rule 11, F.R.C.P., which requires all filings to be signed in good faith and well grounded in fact. The District Court record before the Eighth Circuit Court panel clearly showed that Petitioner's then attorney objected to many of the allegedly agreed upon facts in the Response Brief he filed on Petitioner's behalf on 2-10-81, even advising Counsel he knew that some critical "facts" were false of his own personal knowledge.

The current (third) Judge, to whom the case was transferred on 7-25-91, and who stated he was going to "get rid of this case one way or another", used the false statements in the allegedly agreed upon stipulations to justify cancelling Petitioner's note and deed of trust on the Winnebago South subdivision, and to issue a Partial Summary Judgment against Petitioner. This, dispite the fact that the Court had before it ample testimony and other evidence and authority controverting the disputed facts and the conclusions of law the District Court based upon the disputed statements.

The District Court abused its descretion by basing its draconion ruling on a deficient and defective procedure in its quest to "get rid of this case one way or another".

No legitimacy or authenticity was ever attributed to the rogue pleading with the attached unsigned document claiming to be agreed upon stipulations of facts filed by Respondents'/Plaintiffs' Counsel on 6-30-81 until the 10-25-91 ex parte letter to the third/current Judge and a Memorandum Counsel submitted to the Court, distributed only to those in attendance at the 2-21-92 conference. Neither Petitioner nor her husband were provided with notice of the conference, and did not learn of it until long after it took place. (See App. 10, 2-21-92 Memorandum from Judge Bartlett to his secretary, and Statement Of Case, p. 6, herein.)

The District Court, in a systematic, calculated strategy, deprived Petitioner of a Seventh Amendment jury trial, and took it upon itself to control the outcome of a truncated trial, all without regard to established rules of procedure and law intended to ensure fairness and justice in

actions tried in the federal courts.

Respondents/Plaintiffs were relieved of all burden of proving the claims they asserted against Petitioner, and were allowed to use the so-called stipulations and the orders throughout the trial to influence the jury. This, in addition to the fact the Court told the jury that the "facts" it had established/determined had been "conclusively established" by a court in another proceeding.

The Cancellation Order

The District Court utilized the disputed stipulations in a Cancellation Order, taking substantial interests in property from Petitioner by summary action in advance of jury trial, an action for which the Beacon Court ruled the district judge was "without discretion".

The cancellation was based upon alleged inflated value paid by WSI when it purchased the subdivision from Petitioner in 1969, several months before the ILSA became effective. Missouri Law requires proof that a cancellation of an instrument must be based on proof of fraudulent intent to defraud a creditor. No such creditors existed. Respondents/Plaintiffs theorized, without credible basis, that defendants intended to, at some time, defraud future creditors, a higher standard of proof. No such proof was submitted. The "proof" upon which the Court relied was inferences made from assorted false or irrelevant statements endorsed by the Court in its stipulations ruling.

The sole source of value evidence at time of sale was testimony by the current Receiver, who "adopted" the stipulations. He admitted he was not an appraiser and that he was a schoolboy at the time of sale. His testimony was even a repudiation of the value attributed to the subdivision by his father, the initial Receiver, in an affidavit and in status reports. These are part of the District Court record before Eighth Circuit Court panel.

The District Court gave no weight to evaluations made by that initial Receiver, nor by others which are part of its own files, made contemporaneously with the

sale transaction, nor to the value of the subdivision before the sale. All weight was accorded to Respondents'/Plaintiffs' unsupported allegations and to the successor/current Receiver, who was allowed to be represented by Respondents'/Plaintiffs' Counsel, and who sat with them in Court and acted, not as a fiduciary, but as a Respondents'/Plaintiffs' advocate.

Petitioner and the other defendants were denied the right to impeach the Receiver's credibility as a valid source of value evidence at trial. The public record confirmed his attorney liability insurer paid $650,000 to a St. Louis bank which had relied on his opinion in making a $4,000,000 loan to a real estate development partnership venture in which his father's Trust was a partner.

In another matter that developed just before trial in this case, the Receiver paid a fine and signed a consent decree as a result of charges by the U. S. Comptroller Of The Currency that he had breached his fiduciary duty as a bank official by making unsecured, unappraised loans to real estate entities controlled by himself or with others. He is barred from federally involved financial institutions and the decree did not rule out criminal prosecution.

In view of the District Court's reliance on the current Receiver for value testimony in cancelling Petitioner's property interests, she should not have been precluded from eliciting testimony from him when Respondents/Plaintiffs and the Court alleged fraud. (37 AmJur 2d, Character And Reputation.)

Regarding "Questions Presented" III, Summary Judgment

The District Court placed the capstone on its structure to deny Petitioner a Seventh Amendment jury trial by granting partial summary judgment to Respondents/Plaintiffs on the eve of jury trial, 156 days after argument on their Motion. It purported to be based on F.R. C.P. 56(c). It failed to comply with requirements to issue it "forthwith" and a requisite finding that "no genuine issue of material fact" remained, held to be reversible error. Rachal v. Hill, 438 F.2d 59 (5th Cir. 1970.)

The District Court, in fact, appropriated a right under F.R.C.P Rule 56(d), without citation, to find facts "that appear to be without substantial controversy", an error of law and fact, since issues of status and liability were matters for the jury.

"Credibility determinations, the weight of the evidence and the drawing of legitimate inferences from the facts are a jury function, not those of a judge, whether the judge is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 255 (1986) (Internal cites omitted.)

The District Court's Order concluded that Petitioner was: 1) a "fraudulent profit maker" at all times after February 6, 1969. (Not a cause of liability under initial ILSA.) 2) An "agent" of developer WSI until 11-7-69. 3) A "developer" of subdivision after April 23, 1971. All dates were retroactive or retrospective application to Petitioner of ILSA, effective April 28, 1969.

These findings were used as jury instructions for Petitioner only; all counts for co-defendants were identical. Jurors were told these facts had been determined by a court in "another trial", and must be taken "as conclusively established" against Petitioner.

(Petitioner's note: Such establishments of fact are rulings on questions of law as provided in Rule 56(a), and are not shielded by the "clearly erroneous" standard of review. F.R.C.P. note on 1991 amendment of Rule 52(c).)

These were intended to - and did - compel the jurors to conclude that Petitioner could only have been a "fraudulent profit maker" if she indeed were a developer or agent under the ILSA, and therefore must be liable.

The District Court is in conflict with the Third and Ninth Circuit Courts of Appeal.

Sellers of tracts for a subdivision who retain no interest other than a deed of trust to secure payment, and provide no managerial efforts affecting the success of the

enterprise, are entitled to summary judgment. De Luz Ranchos Inv. v. Coldwell Banker & Co., 608 F. 2d 1297, 1301 (9th Cir. 1979); Bartholomew v. Northhampton Nat.Bank, 584 F. 2d 1288, (3rd Cir. 1978).

CONCLUSION

The entire judicial system has been undermined in this case. The United States Constitution has been disregarded. The system of stare decisis has been undermined. The Federal Rules of Civil Procedure have been used in ways not intended, to subvert the effect of the Constitution and the Eighth Circuit Court of Appeals.

The Eighth Circuit Court panel, by refusing review, the only recourse of this aggrieved Petitioner, so departed from the accepted and usual course of judicial procedure in sanctioning the actions of the District Court, as to call for an exercise of the Supreme Court's power of supervision.

The Eighth Circuit Court's affirmance of the Judgement below places it in conflict with the Supreme Court and its own precedents, as well as with other circuits upholding the right to a Seventh Amendment jury trial as defined by Beacon, et al.

By refusing to acknowledge or review a series of errors of law and errors of judgment spread on the available record on review and detailed in Petitioner's briefs, exhibits and transcripts and the Court's own Orders and other documentation, the Circuit Court has ratified an extraordinary course of conduct by the District Court calculated to evade jury trial on issues affecting Petitioner which the District Court was clearly determined to control -- contrary to settled law.

The errors of law, errors of judgment, and violations of federal rules, do not require a complete transcript for review, and are not protected by the "clearly erroneous" standard of review recited. They do not involve available options within applicable law so much as deliberate evasions of law by misuse of procedures not available where

a defendant is entitled to a jury trial of right - not an examination of the limits of discretion. (This, aside from the fact there were ample transcripts as well as other documentation in the District Court record.)

Where no discretion existed to take actions to control the outcome of this action, judicial power was employed/ substituted.

The District Court made its pretrial rulings and orders without reference to the plain language of the ILSA, and ordered defendants at jury trial to avoid "confusing" the jury with reference to it. It made its rulings and issued orders, not on the facts and law expressed in the controlling statute, but on "circumstantial evidence" based on disputed statements of fact created by Respondents'/Plaintiffs' Counsel in an effort to create a prima facie case.

The "stipulated facts" upon which the Court based its rulings and orders, both before and during jury trial, were largely irrelevant and immaterial to determinations required to be made under the statute, and were calculated to impugn the character and creditility of Petitioner and prejudice the jury and the appellate courts.

Beginning in March, 1992, after more than 20 years of pendancy, Petitioner was subjected to onerous and expensive exercises in futility resulting from orders to submit pleadings and attend hearings far from home weeks at a time, for more than 5 years, before appeal was ripe.

In 1994, the District Court had published in the Federal Supplement its arbitrary and capricious findings from which Petitioner had no available review. These findings recklessly impugned, without just cause, her character and credibility, and, in accused her of fraudulent actions, imputed to her, an attorney, the taint of moral turpitude. "Where do I go to get my reputation back?"

Every avenue of timely review was blocked by the District Court because absent certification to the Appellate Court by it, all its rulings remained interlocutory and protected from review.

Petitioner and her co-defendants were repeatedly taunted by the Court with allusions to their right to appeal at some point "a year from now and many thousands of dollars from now". After a sham "jury trial" in which Petitioner and her co-defendant husband were barred by pretrial rulings from offering a defense, they were required to reargue the Seventh Amendment right to a jury trial and available remedies - remedies which are unambiguously stated in the statute under which Respondents/Plaintiffs claimed federal court jurisdiction in their Complaints.

The District Court continued to use its power to block production of Petitioner designated transcripts, ordering that she order transcripts of all proceedings, even pretrial proceedings, with the full knowledge it was beyond her financial means to do so.

The Eighth Circuit Court had notice before trial began of the District Court's departures from the mandate of the Supreme Court to accord jury trial on all issues. It denied Petitioner's application for Writs of Mandamus and Prohibition to order the District Court to comply with controlling law of the Supreme Court and its own Circuit. Under the circumstances recited, the right to mandamus is settled. Beacon, at 511.

The District Court made reference to this 28 year old case as an "embarrassment" to the federal courts. Should the desire of the District Court and the Eighth Circuit Court to rid themselves of an "embarrassment" justify abandonment of all standards of justice and fair play expected in the federal courts? Does it justify the District Court getting rid of this case "one way or another" by abandoning constitutionally protected rights, established law, the rules of procedure, and even an "appearance of justice". (The current District Court Judge once said to Petitioner and her husband at sidebar: "Justice, phooey".)

Is it preferable to convert an "embarrassment" to a scandal in the administration of justice?

Respectfully submitted,

Juanita F. Steinhilber
Pro Se

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3245WMKC	•	
Michael S. McFarland, et al.,	•	
Appellees,	•	Appeal from the
	•	United States District
vs.	•	Court for the Western
	•	District of Missouri
Johnita F. Steinhilber,	•	
Appellant.	•	

Submitted: August 6, 1999

Filed: August 11, 1999

Before McMILLIAN, RICHARD S. ARNOLD, and HANSEN, Circuit Judges.

PER CURIAM.

Robert V. Steinhilber and Johnita F. Steinhilber appeal from the final judgment entered in the District Court[1]

[1] The Honorable D. Brook Bartlett, Chief Judge, United States District Court for the Western District of Missouri.

for the Western District of Missouri, as well as the denial of several pre-trial and post-trial motions, following a jury verdict in this class action brought against them under the Interstate Land Sales Full Disclosure Act (ILSA), 15 U. S.C. § 1703 et seq. For the reasons discussed below, we affirm the judgment of the district court.

We find that the Steinhilbers were not denied their right to a jury in the district court, as the remedies sought and granted against them were equitable in nature. See Kerr v. Charles F. Vatterott & Co., No. 98-1677, 199 WL 493996, at *5 (8th Cir. July 12, 1999); Tri-State Hotels, Inc. v. FDIC, 79 F.3d 707, 715 (8th Cir. 1996). We are unable to review other claims raised by the Steinhilbers because they have not submitted necessary transcripts, see Fed.R.App.P. 10(b)(2); Schmid v. United Bhd. of Carpenters, 827 F.2d 384, 386 (8th Cir. 1987)(per curiam), cert. denied, 484 U.S. 1071 (1988), and this court will not weigh the credibility of witnesses, see United States v. Big D Enterprises, Inc.. No. 98-2861, 1999 WL 493114, at *4 (8th Cir. July 9, 1999.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals,
Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3245WMKC	*	
Michael S. McFarland, et al.,	*	
Appellees,	*	Appeal from the
	*	United States District
vs.	*	Court for the Western
	*	District of Missouri
Johnita F. Steinhilber,	*	
Appellant.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.
(5193-010199)

September 16, 1999

Order Entered at the Direction of the Court
S/S Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

MICHAEL S. MCFARLAND, et al.,)
Plaintiff (s),)
)
v..) NO. 19967-CV-W-9
)
WINNEBAGO SOUTH, INC., et al.,)
Defendant (s))

__X__ Jury Verdict. This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to trial or or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_____ This action has come before the Court as a briefed matter and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that 1) Plaintiffs' motion for partial summary judgment is GRANTED; and 2) as a matter of law, Johnita Steinhilber was an "agent"

of developer WSI until 11/7/69, when Sales Management Co. No longer acted as a sales agent for lots in Winnebago South; 3) as a matter of law, Johnita Steinhilber was a developer of Winnebago South after 4/23/71; and 4) as a matter of law, Johnita Steinhilber was a "fraudulent profit maker" for purposes of the ILSA at all time after 2/6/69, when she conveyed the Williams Farm to WSI. (Order entered ll/3/95).

IT IS ORDERED AND ADJUDGED that 1) Plaintiffs' motion for summary judgment against Defendant Winnebago, Inc. is GRANTED; 2) As a matter of law, Winnebago South, Inc. Is a developer for purposes of the ILSA; 3) As a matter of law, Winnebago South, Inc. sold lots by means of a statement of record that did not comply with Sec. 1707; and 4) as a matter of law, Winnebago South, Inc. violated 15: 1709 (b) (2). (Order entered 11/9/95).

VERDICT A - on plaintiff's claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, defendant Robert V. Steinhilber used a scheme to defraud plaintiffs, under Instruction 15, 23, the jury, finds in favor of plaintiffs.

VERDICT B - on plaintiff's claim that, in connection with the sale of lots in Winnebago South after

4/28/69, defendant Robert V. Steinhilber engaged in a practice or course of business that operated as a fraud on plaintiffs, under Instruction 18, we, the jury, find in favor of plaintiffs.

VERDICT C - on plaintiffs' claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, defendant Robert V. Steinhilber obtained money or property by using a misrepresentation of a material fact upon which a plaintiff relied in deciding to purchase a lot, under Instruction 21, we, the jury, find in favor or (sic) plaintiffs.

VERDICT D - on plaintiffs' claim that, in connection with the sale of lots in Winnebago South after 4/28/69, defendant Robert V. Steinhilber used a Property Report that contained an untrue statement of material fact or used a Property Report that omitted to state a material fact, under Instruction 24, we, the jury, find in favor of plaintiffs.

VERDICT E - on plaintiffs' claim that defendant Robert V. Steinhilber was involved in a conspiracy with Winnebago South, Inc. To sell lots in Winnebago South after 4/28/69, using a Property Report that contained an untrue statement of material or using a Property Report that omitted to state a material fact, under Instruction

29, we, the jury, find in favor of plaintiffs.

VERDICT F – on plaintiffs' claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, defendant Johnita F. Steinhilber used a scheme to defraud plaintiffs, under Instruction 34, 23, the jury, find in favor of plaintiffs.

VERDICT G – on plaintiffs' claim that, in connection with the sale of lots in Winnebago South after 4/28/69, defendant Johnita F. Steinhilber engaged in a transaction, practice or course of business that operated as a fraud on plaintiffs, under Instruction 38, we, the jury, find in favor of plaintiffs.

VERDICT H – on plaintiffs' claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, defendant Johnita F. Steinhilber obtained money or property by using a Statement of Record or Property Report that contained a misrepresentation of a material fact upon which a plaintiff relied in deciding to purchase a lot, under Instruction 42, we, the jury, find in favor of plaintiffs.

VERDICT I – on plaintiff's claim that, in connection with the sale of lots in Winnebago South after 4/28/69, defendant Johnita F. Steinhilber used a Property Report

that contained an untrue statement of material fact or used a Property Report that omitted to state a material fact, under Instruction 46, we, the jury, find in favor of plaintiffs.

(Petitioner note: "VERDICT J - on plaintiffs clsim (sic) that dft Johnita F. Steinhilber was involved in a conspiracy with Winnebago South, Inc. to sell lots in Winnebago South after 4/28/69, using a Property Report that contained an untrue statement of material fact or using Property Report that omitted to state a material fact, under Instruction 51, we, the jury, find in favor of dft. Johnita F. Steinhilber." OMITTED FROM JUDGMENT. Motion to Correct denied. Doc. Sheet p. 93.)

VERDICT KK - on plaintiffs' claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, dft Grandview Bank used a scheme to defraud plaintiffs, under Instruction 101, we, the jury, find in favor of Grandview Bank.

VERDICT LL - on plaintiffs' claim that, in connection with the sale of lots in Winnebago South after 4/28/69, dft Grandview Bank engaged in a transaction, practice or course of business that operated as a fraud on plaintiffs, under Instruction 104, we, the jury, find in favor of dft Grandview Bank.

VERDICT MM - on plaintiffs' claim that, in connection with offering to sell or selling lots in Winnebago South after 4/28/69, defendant Grandview Bank obtained money or property by using a Statement of Record or Property Report that contaianed a misrepresentation of a meterial fact upon which a plaintiff relied in deciding to purchase a lot, under Instruction 107, we, the jury, find in favor of defendant Grandview Bank.

VERDICT NN - on plaintiffs' claim that, in connection with the sale of lots in Winnebago South after 4/28/69, defendant Grandview Bank used a Property Report that contained an untrue statement of material fact or used a Property Report that omitted to state a material fact, under Instruction 110, we, the jury, find in favor of defendant Grandview Bank.

VERDICT OO - on plaintiffs' claim that defendant Grandview Bank was involved in a conspiracy with Winnebago South, Inc., to sell lots in Winnebago South after 4/28/69, using a Property Report that contained an untrue statement of material fact or using a Property Report that omitted to state a material fact, under Instruction 115, we, the jury find in favor of defendant Grandview Bank. (Verdicts were issued by the Jury on 2/13/96)

GENERAL RELIEF GRANTED AND PROCEDURES FOR ADDITIONAL SUBSEQUENT REMEDIES - 1) Defendants Winnebago South, Inc. ("WSI"), Robert V. Steinhilber and Johnita F. Steinhilber, and each of them, shall make a full and complete accounting to the Court, within 30 days of the date of this order and decree, of all money and/or property (including notes or any rights thereunder) received by any of them, or their agents, assignees or transferees:

a) from each member of the class with respect to the purchase or ownership of a lot in the Subdivision (regardless of whether in the form of a deposit, down payment, cash payment, principal or interest payment, credit life insurance premiums, easement or dock assignment, maintenance fee, or homes association dues payment);

b) from any other person or entity in connection with the purchase, sale, transfer, assignment, loan, pledge or hypothecation of any note or other evidence of indebtedness received from any member of the class in connection with the sale of any lot in the subdivision; and

c) from any other defendant, which relates in any manner to the activities or operations of Winnebago Soutk, Inc., including, but not limited to: salaries; consulting fees; director's fees; dividends; commissions; draws; personal, living, travel or "study" expenses; loan

payments; note payments; lot release fees; reserved account deposits; withdrawals, and/or earnings; or the proceeds from the purchase, sale, transfer, assignment, loan, pledge or hypothecation of any property not otherwise accounted for in response to subparagraph B.

2) Defendants Robert Steinhilber, Johnita Steinhilber and Winnebago South, Inc., ("WSI"), and each of them, shall immediately deliver to the duly appointed Receiver for WSI any and all monies, property and any other thing of value received, directly or indirectly, from any and all members of the plaintiff class, and a constructive trust is hereby impsed upon any such monies, property or thing of value, or the proceeds thereof, if in any defendant's possession.

3) Any contracts executed between plaintiff class members and Winnebago Soutk, Inc., dated between the dates of September l, 1968 and December 21, 1971, are hereby rescinded, cancelled, and held for naught except:

a) Contract executed by Gilbert L. and Ellen D. Worley for the purchase of Lot A-19.

b) Contract executed to Melvin and Sandra T. Sehorn for the purchase of Lot A-112.

c) Contract executed by W. Rupert and DeEsta Ramsay for the purchase of Lot A-21.

d) Contract executed by Nott S. and Ruby G. Meloy for the purchase of Lot A-37.

e) Contract executed by Charles J. and June Hebert for the purchase of Lot A-172.

f) Contract executed by Richard A. and Emma L. Evans for the purchase of Lot A-38, dated December 1, 1968.

g) Contract executed by Roger G. and Violet L. Slusher for the purchase of Lot A-36.

h) Contract executed by Mary E. Stiles for the purchase of Lot A-34, dated March 7, 1969.

Any person in possession of the original of any such contracts for sale, not otherwise excluded from the terms of this Order, shall surrender them immediately to the Receiver to be marked "cancelled" and returned to the lot purchaser.

4) Any notes and/or deeds of trust given; by any one to Winnebago South, Inc., or its designated trustee,

dated between the dates September 1, 1968 and December 21, 1971, are hereby rescinded, cancelled and held for naught except:

a) Note dated September 29, 1968, given by Nott S. and Ruby G.. Meloy.

b) Note dated December 1, 1968, given by Richard A. and Emma L. Evans.

5) Any person in possession of the original of any of said notes and/or deeds of trust shall immediately return any and all notes and/or deeds of trust to the Receiver to be marked "cancelled" pursuant to further order of the Court.

6) Any transfer, assignment, gift, sale, negotiation, pledge, or hypothecation of any note, or deed of trust obtained from any class member is hereafter prohibted and enjoined.

7) Any deed conveying title to any lot in Winnebago South, Inc. pursuant to any sales transaction taking place between the dates of September 1, 1968 and December 21, 1971 are hereby rescinded and cancelled except:

a) Deed given to Gilbert L. and Ellen D. Worley, dated

February 14, 1969, conveying Lot A-19.

b) Deed given to Melvin and Sandra T. Sehorn, dated April 16, 1969, conveying Lot A-112.

c) Deed given to W. Rupert and DeEsta Ramslay, dated November 26, 1968, conveying Lot A-21.

d) Deed given to Nott S. and Ruby G. Meloy, dated March 11, 1969, conveying Lot A-37.

e) Deed given to Charles J. and June Hebert, dated February 14, 1969, conveying Lot A-172.

f) Deed given to Richard A. and Emma L. Evans, dated March 11, 1969, conveying Lot A-38.

g) Deed given to Roger G. and Violet L. Slusher, dated December 7, 1968, conveying Lot A-36.

h) Deed given to Mary E. Stiles, dated March 7, 1969, conveying Lot A-34.

i) Deed to David L. Gibson, dated June 6, 1971, conveying Lot B-15.

j) Deed given to David L. Gibson, dated August 16,

1971, conveying Lot B-18.

k) Deed given to Elvin S. Douglas, Jr., dated August 4, 1969, conveying Lot D-31.

l) Deed given to Robert W. Spangler, dated August 4, 1969, conveying Lot D-32.

m) Deed given to Marvin L. and Sauna Rue Bonner, dated May 12, 1971, conveying Lot D-48.

8) Pursuant to Fed. R. Civ. P. 70, title to each of the lots identified in ¶ 7 is hereby conveyed to WSI.

9 In exchange for the rescission of each lot sale, and the cancellation of each of the instruments described herein, each member of the class shall be entitled to restitution of a proportionate share of the amounts paid in exchange for their lot(s). Each class member is hereby granted an equitable lien on the proceeds of the sale of any assets of WSI in an amount which shall be determined by further order of the Court.

10) Robert L. Jackson, Jr., as Receiver for WSI, is hereby authorized and directed to undertake the following tasks for the purpose of preparing the real estate comprising the Winnebago South Subdivision for sale:

a) to make all reasonable efforts to obtain clear title, or the right thereto, to as many lots or parcels of land as reasonably possible within the Winnebago South Subdivision, with the ultimate goal to created the largest possible tract of land to be marketed for sale and/or ultimately sold, subject to prior Court order approving any such sales transactions;

b) to develop a plan for the marketing and sale of the Winnebago South Subdivision real property in such fashion as will maxiumize the net cash money available to satisfy the class members' claims against WSI;

c) to undertake any and all efforts which he shall determine to be appropriate to negotiate a contract for the sale of the Winnebago South real property, which contract shall be made expressly contingent upon the approval of this Court;

d) to submit to the Court any final contract which he has been able to negotiate for the sale of the Winnebago South real estate;

e) to hold and invest at interest the proceeds derived from such sale or disposition, after payment of debts, costs and expenses of administration as the Court may determine to be appropriate; and

f) to distribute such net proceeds as further ordered by the Court.

Pursuant to Fed. R. Civ. P. 54(b), the Court determines that, except with respect to those matters upon which this Memorandum and Order expressly reserves ruling and determination, there is no just reason for delay and therefore directs entry of judgment as to all claims and issues in this litigation with respect to WSI, Robert Steinhilber and Johnita Steinhilber, not expressly reserved herein, including, but not limited to the following:

1) The jury verdict determining the liability of defendants Robert V. Steinhilber and Johnita F. Steinhilber.

2) Order of July 19, 1994 binding the defendants to the stipulations contained in the June 30, 1981 Pretrial Brief of the Parties.

3) Order of September 13, 1994, disallowing claims of Johnita F. Steinhilber and Robert V. Steinhilber and canceling note and deed of trust.

4) Order of November 3, 1995 granting plaintiffs' Motion for Partial Summary Judgment Against Johnita

Steinhilber.

5) Order of November 9, 1995 granting plaintiffs' Motion for Partial Summary Judgment Against Winnebago South, Inc.
(Order entered March 14, 1997)

March 14, 1997 — Date

R. F. Connor — Clerk

K. M. Swain — Deputy Clerk

(INSTRUCTION TO JURY.)

"INSTRUCTION NO. BBB

It has already been determined that:

1) Johnita Steinhilber was a "fraudulent profit maker" at all times after February 6, 1969;

2) Johnita Steinmhilber was an "agent" of developer Winnebago South, Inc. until November 7, 1969; and

3) Johnita Steinhilber was a "developer" of the Lake Winnebago South subdivision after April 23, 1971.

You need not determine these matters and should take these matters as conclusively established."

(Petitioner's Note: Petitioner and other defendants were not allowed to present evidence or argument or contradict or even mention these "facts" to the jury, under penalty of severe sanctions. Even so, these "facts" were still not supported by any evidence presented by by Respondents, and were strongly and frequently contradicted to Court alone. Further, there is no provision in the initial ILSA which was in effect during the period covered in this case for a so-called "fraudulent profit maker".)

(Petitioner's Note: Set forth below are the prayers for relief in the three Complaints filed by Respondents:)

INITIAL COMPLAINT:

Count I

WHEREFORE, plaintiffs pray this Court for judgment on their behalf and on behalf of all persons similarly situated, pursurant to 15 U.S.C. § 1709(a) and (b) and 15 U.S.C. § 1713, and that they recover such damages as shall represent the difference between the amounts paid for the lots aforesaid and the value thereof as of the time this suit was filed, or such amounts as they each shall have paid for such lots at the time of judgment, whichever shall be lesser; and further, pray adjustment of their rights and obligations under any deed or deeds of trust filed and recorded heretofore in favor of the trustee of defendant Winnebago South, Inc., and in favor of the trustee of defendant Winnebago South, Inc., and for an order of this Court

restraining and enjoining said defendants from foreclosing upon properties purchased by defendants or other persons similarly situated, and restraining and enjoining defendants from assigning or transferring any notes, deeds of trust, or other instruments evidencing indebtedness or security interests, to any holder or holders in due course; and further pray for such other rights or remedies existing at law or in equity as this Court may deem reasonable and appropriate.

Count II

WHEREFORE, plaintiffs pray this Court require defendants and each of them to show cause why this Court should not immediately enter its Orders:

(1) Restraining and enjoining defendants and each of them from collecting further payments or assessnents from plaintiffs, and all other purchasers similarly situated; from applying funds already collected from such persons or

otherwise obtained in connection with the development of Lake Winnebago Retirement Village Subdivision for any purpose or purposes other than developing and providing the improvements and recreational facilities defendants represented would be developed and provided; and from dissipating or removing any such funds from the jurisdiction of this Court.

(2) Appointing a receiver to receive and take charge of all purchase monies and maintenance funds heretofore collected by defendants, or any of them, from plaintiffs and other persons similarly situated, and of all proceeds of such said monies, and all such monies as this Court may hereafter direct or permit to be paid; and authorizing such receiver to make no disburesements from such monies received by him other than for purposes of taking such steps to provide the aforesaid improvements and recreational facilities as the Court may from time

to time approve and direct.

(3) Compelling defendants and each of them to account to plaintiffs and to the Court and, if a receiver is appointed, to such receiver, for all purchase monies and maintenance funds heretofore paid by plaintiffs and other persons similarly situated, and for all funds otherwise obtained in connection with the development of Lake Winnebago Retirement Subdivision, and for all proceeds of such monies and things of value held in lieu thereof.

(4) Adjudging and declaring plaintiffs and all other persons similarly situated are entitled to recission of their contracts of purchase for subdivision lots and of all obligations and commitments to any defendant undertaken in connection therewith, and ordering all monies paid in connection therewith to be returned.

Count III

WHEREFORE, plaintiffs pray this Court for judgment in the full sum paid by them and other persons similarly situated under contracts for the purchase of lots in the Retirement Village and as assessments by the Home Owners Association, for punitive damages in the sum of One Million Dollars, and for such other relief and remedies as the Court may deem reasonable and appropriate.

SECOND AMENDED COMPLAINT:

Count I

WHEREFORE, plaintiffs pray this Court for judgment on their behalf and on behalf of all persons similarly situated, pursuant to 15 U.S.C. §1709(a) and (b) and 15 U. S.C. §1713, and that they recover such damages as shall represent the difference between the amounts paid for the lots aforesaid and the value thereof as of the time this suit was filed, or such amounts

as they each shall have paid for such lots at the time of judgment, whichever shall be lesser and further, pray adjustment of their rights and obligations under any deed or deeds of trust filed and recorded heretofore in favor of the trustee of defendant Winnebago South, Inc., and for an Order of this Court restraining and enjoining said defendants from foreclosing upon properties purchased by defendants or other persons similarly situated, and restraining and enjoining defendants from assigning or transferring any notes, deeds of trust, or other instruments evidencing indebtedness or security inte;rests, to any holder or holders in due course; and further pray for such other rights or remedies existing at law or in equity as this Court may deem reasonable and appropriate.

Count II

WHEREFORE, plaintiffs pray this Court require defendants and each of them to show cause why this Court should not immediately enter its Orders:

(1) Restraining and enjoining defendants and each of them from collecting further payments or assessments from plaintiffs, and all other purchasers similarly situated; from applying funds already collected from such persons or otherwise obtained in connection with the development of Lake Winnebago Retirement Subdivision for any purpose or purposes other than developing and providing the improvements and recreational facilities defendants represented would be developed and provided; and from dissapating or removing any such funds from the jurisdiction of this Court.

(2) Appointing a receiver to receive and take charge of all purchase monies and maintenance funds heretofore collected by defendants, or any of them, from plaintiffs and other persons similarly situated, and of all proceeds of such monies, and all such monies as this Court may hereafter direct or permit to be paid; and authorizing such receiver to make no disbursements from such monies received by him other

than for purposes of taking such steps to provide the aforesaid improvements and recreational facilities as the Court may from time to time approve and direct.

(3) Compelling defendants and each of them to account to plaintiffs and to the Court and, if a receiver is appointed, to such receiver, for all purchase monies and maintenance funds heretofore paid by plaintiffs and other persons similarly situated, and for all funds otherwise obtained in connection with the development of Lake Winnebago Subdivision, and for all proceeds of such monies and things of value held in lieu thereof.

(4) Adjudging and declaring plaintiffs and all other persons similarly situated are entitled to rescission of their contracts of purchase for subdivision lots and of all obligations and commitments to any defendant undertaken in connection therewith, and ordering all monies paid in connection therewith to

be returned.

Count III

WHEREFORE, plaintiffs pray this Court for judgment in the full sum paid by them and other personhs similarly situated under contract for the purchase of lots in the Retirement Village and as assessment by the Home Owners Association, for punitive damages in the sum of One Million Dollars, and for such other relief and remedies as the Court may deem reasonable and appropriate.

Count IV

WHEREFORE, plaintiffs pray this Court for judgment on their behalf and on behalf of all persons similarly situated against said added defendants and all other defendants, directing rescission of all contracts of purchase of lots in the Retirement Village and of all obligations and commitments to added defendants in connection there-

with, return of all sums paid in connection therewith, and appointment of a temporary receiver to collect, receive and hold all payments now or hereafter paid as installments by plaintiffs on their purchase money notes, and restraining and enjoining holders of such notes, including the added defendants, from assigning negotiating or transferring the subject notes, deeds of trust, or other instruments evidencing or securing indebtedness arising from the purchase or agreement to purchase lots in the Subdivision.

THIRD AMENDED COMPLAINT:

Count I

WHEREFORE, plaintiffs pray this Court for judgment on their behalf and on behalf of all persons similarly situated, pursuant to 15 U.S.C. §1713, and that they recover such damages as shall represent the difference between the amounts paid for the lots aforesaid and

the value thereof as of the time this suit was filed, or such amounts as they each shall have paid for such lots at the time of judgment, whichever shall be the lesser; and further, pray adjustment of their rights and obligations under any deed or deeds of trust filed and recorded heretofore in favor of the trustee of defendant Winnebago South, Inc., and for an Order of this Court restraining and enjoining said defendants from foreclosing upon properties purchased by defendants (sic) or other persons similarly situated, and restraining and enjoining defendants from assigning or transferring any notes, deeds of trust, or other instruments evidencing indebtedness or security interests, to any holder or holders in due course; and further pray for such other rights or remedies existing at law or in equity as this Court may deem reasonable and appropriate.

Count II

WHEREFORE, plaintiffs pray this Court require defendants and each of them to show cause why this Court should not immediately enter its Orders:

(1) Restraining and enjoining defendants and each of them from collecting further payments or assessments from plaintiffs, and all other purchasers similarly situated from applying funds already collected from such persons or otherwise obtained in connection with the development of Lake Winnebago Retirement Subdivision for any purpose or purposes other than developing and providing the improvements and recreational facilities defendants represented would be developed and provided; and from dissapating or removing any such funds from the jurisdiction of this Court.

(2) Appointing a receiver to receiver and take charge of all purchase monies and maintenance funds heretofore collected by defendants, or any of them,

from plaintiffs and other persons similarly situated, and of all proceeds of such monies, and all such monies as this Court may hereafter direct or permit to be paid; and authorizing such receiver to make no disbursements from such monies received by him other than for purposes of taking such steps to provide the aforesaid improvements and recreational facilities as the Court may from time to time approve and direct.

(3) Compelling defendants and each of them to account to plaintiffs and to the Court, and, if a receiver is appointed, to such receiver, for all purchase monies and maintenance funds heretofore paid by plaintiffs and other persons similarly situated, and for all funds otherwise obtained in connection with the development of Lake Winnebago Retirement Subdivision Subdivision, and for all proceeds of such monies and things of value held in lieu thereof.

(4) Adjudging and declaring plaintiffs and all other persons similarly situated

are entitled to rescission of their contracts of purchase for subdivision lots and of all obligations and commitments to any defendant undertaken in connection therewith, and ordering all monies paid in connection therewith to be returned.

Count III

WHEREFORE, plaintiffs pray this Court for judgment in the full sum paid by them and other persons similarly situated under contracts for the purchase of lots in the Retirement Village land as assessments by the Home Owners Association, for punitive damages in the sum of One Million Dollars, and for such other relief and remedies as the Court may deem reasonable and appropriate.

Count IV

WHEREFORE, plaintiffs pray this Court for judgment on their behalf and on behalf of all persons similarly situ-

ated against the said added defendants and all other defendants, directing and rescission of all contracts of purchase of lots in the Retirement Village and of all obligations and commitments to added defendants in connection therewith, return of all sums paid in connection therewith, and appointment of a temporary receiver to collect, receive and hold all payments now or hereafter paid as monthly installments by plaintiffs on their purchase money notes, and restraining and enjoining holders of such notes, including the added defendants, from assigning, negotiating or transferring the subject notes, deeds of trust, or other instruments evidencing or securing indebtedness arising from the purchase or agreement to purchase lots in the Subdivision.

Count V

WHEREFORE, plaintiffs pray judgment in their favor against defendant Grandview invalidating and cancelling

all notes given in payment for lots in in the subdivision of which defendant Grandview claims ownership, invalidating and cancelling all deeds of trust given as security for payment of such notes held by defendant Grandview; and awarding the maker of each such note damages by him suffered, in the sum of the amounts heretofore and hereafter paid with respect to such notes, or alternatively in the sum of twice the amounts paid by each as interest on the notes, and for their attorneys' fees.

(Petitioner's Note: Following is the initial ILSA, which is the Law in effect during the period involving this case. Sections were initially designated in the 1400's, but were subsequently designated in the 1700's. The District Court used both the 1400 designations and the 1700 designations. In the reprint below, the original 1400 designations are used as in the initial law, however, the 1700 section numbers are also shown immediately after the 1400 section numbers.)

TITLE XIV - INTERSTATE LAND SALES

Short Title

Sec. 1401. This title may be cited as the "Interstate Land Sales Full Disclosure Act".

Definitions

Sec. 1402/1701. For purposes of this title, the term --

(1) "Secretary" means the Secretary of Housing and Urban Development;

(2) "person" means an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate;

(3) "subdivision" means any land which is divided or proposed to be divided into fifty or more lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan where subdivided land is offered for sale or lease by a single developer, or a group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(4) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;

(5) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an attorney at law whose

representing of another person consists solely of rendering legal services.

(6) "blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an option or contract to sell or a trust agreement, affecting a subdivision or affecting moe than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public authority;

(7) "interstate commerce" means trade or commerce among the several states;

(8) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(9) "Purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(10) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

Exemptions

Sec. 1403/1702. (a) Unless the method of disposition is adopted for the purpose of evasion of this title, the provisions of this title shall not apply to --

(1) the sale of lease of real estate not pursuant to a common promotional plan to offer or selll fifty or more lots in a subdivision;

(2) the sale or lease of lots in a subdivision, all of which are five acres or more in size;

(3) the sale or lease of any impfoved land on which there is a residential, commercial, or industrial building, or to the sale or lease of land under a contract obligating the seller to erect such a building thereon within a period of two years;

(4) the sale or lease of real estate under or pursuant to court order;

(5) the sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate;

(6) the sale of securities issued by a real estate investment trust;

(7) the sale or lease of real estate by any government or government agency;

(8) the sale or lease of cemetery lots;

(9) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of contructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or

(10) the sale or lease of real estate whivch is free and clear of all liens, encumbrances, and adverse claims if each and every purchaser or his or her spouse has personally inspected the lot which he purchased and if the developer executes a written affirmation to that ef-

fect to be made a metter of record in accordance with the rules and regulations of the Secretary. As used in in this subparagraph, the terms "liens," "encumbrances", and "adverse claims" are not intended to refer to property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed nor to taxes and assessments which, uner applicable State or local law, constitute liens on the property before they are due and payable.

(b) The Secretary may from time to time, pursuant to rules and regulations issued by him, exempt from any of the provisions of this title any subdivision or any lots in a subdivision, if he finds that the enforcement of this title with respect to such subdivision or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited chacter of the public offering.

Prohibitions Relating To The Sale Or Lease Of Lots In Subdivisions

Sec. 1404/1703. (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails -

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is

in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision --

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any informa- information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and; upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this title, where the property report has not been given to the purchaser in advance or at the time of his signing, shall be voidable at the option of the purchaser. A purchaser may revoke such contract or aagreement within forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide, except that the contract or agreement may stipulate that the

foregoing revocation authority shall not apply in the case of a purchaser who (1) has received the property report and inspected the lot to be purchased or leased in advance of signing the contract or agreement, and (2) acknowledges by his signature that he has made such inspection and has read and understood such report.

Registration Of Subdivisions

Sec. 1405/1704. (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this title and such rules and regula- regulations as may be prescribed by the Secretary in furtherance of the provisions of this title. A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title, and such excpenses as are paid from such fees shall be considered non-administrative.

(c) The filing with the Secretaary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b)

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

Information Required In Statement Of Record

Sec. 1406/1705. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section --

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access

to the subdivision, the availability of sewage disposal faccilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or person bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, in any, taken to protect the purchaser in such eventuality;

(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other

person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

Taking Effect Of Statements Of Record And Amendments Thereto

Sec. 1407/1706. (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the

statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the constnet of the Secrtetary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidate statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statemennt or the amendment until thirty days after the developer files such additional information as the Secretary shall require, Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request

by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it apapears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production

of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

Information Required In Property Report

Sec 1408/1707. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretalry may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the

property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

Cooperation With State Authorities

Sec. 1409/1708. (a) In administering this title, the Secretary shall cooperate with State authorities charge with the responsibility of regulating the sale of lots in subdivisions which are also subject to this title and may accept for filing under section 1405 and declare effective as a statement of record, if fhe finds such action to be appropriate in the public interest or for the protection of purchasers, material filed with and found acceptable by such authorities.

(b) Nothing in this title shall affect the jurisdiction of the real estate commission (or any agency or office performing like functions) of any State over any subdivision or any person.

Civil Liabilities

Sec. 1410/1709. (a) Where any part of the statement of record, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, any person acquiring a lot in the subdivision covered by such statement of record from the developer or his agent during such period the statement remained uncorrected

(unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue the developer.

(b) Any developer or agent, who sells or leases a lot in a subdivision --

(1) in violation of section 1404, or

(2) by means of a property report which contained an untrue statement of a material fact; or omitted to state a material fact required to be stated therein, may be sued by the puirchaser of such lot.

(c) The suit authorized under subsection (a) or (b) fmay be to recover such damages as shall represent the difference between the amount paid for the lot and the reasonable cost of any improvements thereto, and the lesser of (1) the value thereof as of the time such suit was brought, or (2) the price at which such lot shall have been dispósed of in a bona fide market transaction before suit, or (3) the price at which such lot shall have been disposed of after suit in a bona fide market transaction but before judgment.

(d) Every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment.

(e) In no case shall the amount recoverable under

this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs.

Court Review Of Orders

Sec. 1411/1710. (a) Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United "States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record upon which the order or determination complained of was entered, as provided in section 2112 of title 28, United States Code. No objection to an order or determination of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary. The finding of the Secretary as to the facts, if support by substantial evidence, substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional

evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon a hearing in such maner and upon such terms and conditions as the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendaion, if any, for the modification or setting aside of the original order. Upon the filing of such petition, the jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Secretary, shall be final, subject to revierw by the Supreme Court of the United States upon certiorari or certification as provided in Section 1254 of title 28, United States Code.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Secretary's order.

Limation Of Actions

Sec. 1413/1711. No action shall be maintained to enforce any liability created under section 1410(a) or (b)

(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 1401 (b) (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought by a purchaser more than three years after the sale or lease to such purchaser.

Contrary Stipulations Void

Sec. 1413/1712. Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this title or of the rules and regulations of the Secretary shall be void.

Additional Remedies

Sec. 1414/1713. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Investigations, Injunctions, And Prosecution Of Offenses

Sec. 1415/1714. (a) Whenever it shall appear to the Secretary that any person is engaged or about to engage in any acts or practices which constitute or will con-

stitute a violation of the provisiions of this title, or of any rule or regulation prescribed pursuant thereto, he may, in his discretion, bring an action any district court of the United States, or the United States District Court for the District of Columbia to enjoy (sic) such acts or practices, and, upon a proper showing, a permanent injunction or restraining order shall be granted without bond. The Secretary may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the appropriate criminal proceedings under this title.

(b) The Secretary may, in his discretion, make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation prescribed pursuant thereto, and may require or permit any person to file with him a statement in writing, under oath or otherwise as the Secretary shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Secretary is authorized, in his discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which he may deem necessaary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning

the matters to which this title relates.

(c) For the purpose of any such investigation, or any other proceeding under this title the Secretary, or any officer designated by him, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memorandums, or other records which the Secretary eems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and terstimony of witnesses and the production of books, papers, correspondence, memorandums, and other records and documents. And such court may issue an order requiring such person to appear before the Secretary or any office designated by the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the

court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memorandums, and other records and documents before the Secretary, or in obedience to the subpena of the Secretary or any officer designated by him, or any cause or proceeding instituted by the Secretary, on the ground that the testimony or evidence, documentary or otherwise, required of himf may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Administration

Sec. 1416/1715. (a) The authority and responsibility for administering this title shall be in the Secretary of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with

respect to investigating, hearing, determining, ordering, or otherwise acting as to any work, business, or matter under this title. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department in compliance with sections 3105, 3344, 5362, and 7521 of title 5 of the United States Code. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(b) All hearings shall be public and appropriate records thereof shall be kept, and any order issued after such hearing shall be based on the record made in such hearing which shall be conducted in accordance with the provisions of the Administrative Procedure Act.

Unlawful Representations

Sec.. 1417/1716. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representa-

tion contrary to the foregoing.

Penalties

Sec. 1418/1717. Any person who willfully violates any of the provisions of this title or the rules and regulations prescribed pursuant thereto, or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to, this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein, shall upon conviction be fined not more than $5,000 or imprisoned not more than five yeaars, or both.

Rules, Regulations, And Orders

Sec. 1419/1718. The Secretary shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon him elsewhere in this title. For the purpose of his rules and regulations, the Secretary may classify persons and matters within his jurisdiction and prescribe different requirements for different classes of persons or matters.

Jurisdiction Of Offenses And Suits

Sec. 1420/1719. (a) The district courts of the United States, the United States courts of any territory, and

the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, or all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or whereever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of title 28, United States Code. No case arising under this title and brought in any State court of competent jurisdicition shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this title brought by or against him in the Supreme Court or such other courts.

Appropriations

Sec. 1421/1720. There are authorized to be appropriated such sums as may be necessary to carry out this title.

Effective Date

Sec. 1422/no corresponding "1700" section. This title shall take effect upon the expiration of two hundred and seventy days after the date of its enactment.*

(Petitioner's Note: * Effective date was April 28, 1969.)

App. 7

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Docket Continuation Sheet

Plaintiff	Defendant	Docket No.
Michael S. McFarland, et al.	Winnebago South, Inc. et al.	19967-CV-W-B-9
		Page 95

Date	NR.	Proceedings
6/3/96	520	ORDER - 1) the dfts had a 7th Amendment right to a jury trial; 2) because pursuant to Rule 54(b), FRCP, there is no just reason for delay, jgm is entered in favor of Grandview Bank;

WATSON, ESS, MARSHALL & ENGGAS

May 31, 1985 (Emphasis added.)

The Honorable John W. Oliver
Senior Judge
United States District Court
for the Western District;
of Missouri
811 Grand Avenue
Kansas City, Missouri 64106

Re: McFarland, et al v. Winnebago South, Inc., et al.
Case No 19967-3

Dear Judge Oliver:

At the invitation of plaintiffs' counsel, as proposed in your letter to all counsel dated May 6th, all counsel of record in this matter convened on the morning of the 28th to discuss appropriate procedures and steps for moving this action toward ultimate disposition.

.....

This letter, prepared by agreement of all in attendance, is intended to advise the Court of the results of counsels' discussions.

.....

(Page 2)

It was agreed that three steps could be profitably undertaken at once:

1. Determination of the precise procedural status. In view of the class nature of the action the size of the class (approximately 350 individuals and marital communities as originally defined subsequently narrowed some-

what by the Court sua sponte, on jurisdictional grounds) the number of defendant individuals and entities and the several varieties of financing transactions alleged to have occurred, the action, alleging claims under the Interstate Land Sales Act and pendant claims, has been treated as de facto complex. The parties therefore prepared and filed detailed pre-trial narratives and statements of legal contentions, as well as their lists of witnesses and exhibits; and thereafter attempted to meld their respective filings into a Joint Pre-Trial Brief defining areas of stipulated and contested fact and disputed issues of law. (Emphasis added.)

However, none of the counsel have been able to determine with confidence from their own files or from cursory review of the Court files whether the detailed and potentially valuable Joint Pre-Trial Brief which was so developed was executed and filed with the Court; and at least one of the counsel present, after reviewing the dock-docket sheets, had questions regarding the degree to which 1981 rulings had made complete disposition of certain legal issues which had been made the subjects of motions. (Emphasis added.)

.....

Respectfully,

WATSON, ESS, MARSHALL
& ENGGAS

S/S
Paul R. Lamoree
Counsel for the Plaintiff
Class

PRL/lw
cc: All counsel of record.

(Petitioner's note: Photocopy of entire letter was Exhibit # 230 before Eighth Circuit Court panel.)

(Petitioner's note: Following is testimony of Elvin S. Douglas, Jr., Esq., before Honorable D. Brook Bartlett, current Judge, taken on March 25, 1994 (before said Judge made July 19, 1994 ruling binding Petitioner and her husband to the so-called stipulations. Mr. Douglas had been appointed liaison attorney for all defendants by the immediately previous Judge. The transcript is in the record of the District Court which was before the Eighth Circuit Court panel.)

Mr. Douglas, referring to the alleged stipulations:

> "They were never submitted to me for signature, they were never signed by me, I was never asked to sign them or approve them and I do not characterize them as stipulations. They're his (Respondents'/Plaintiffs' former lead attorney, Paul R. Lamoree) version of negotiations."

Referring to the truth of the alleged stipulations:

> "Let me point out the one that I think is the most obvious. It refers to paragraph 20 that Joan (Petitioner) was an active participant in the activities of Winnebago South, Inc. That was marked to be deleted. I don't think it was and I know of my own knowledge that she was not an active participant in the activities of WSI. <u>That's just an example of things that I had marked on my draft that is not incorporated within the one filed.</u>" (Emphasis added.)

(Mr. Douglas has been attorney for WSI from its very beginning. He was cross-examined by several attorneys and the Court.)

(Petitioner's note: This Memorandum was discovered by Petitioner several years after Judge Bartlett had sent it to his secretary. It was sent by an unknown person in with some copies of unrelated docments she had requested.)

Memorandum

To: Tina

From: Brook

Re: McFarland v. Winnebago South

Date: February 21, 1992

At the conference today, the following was accomplished:

1) We updated the list of appearances for the as (sic) follows:

Defendants Winnebago South, R. V. and J. T. Steinhilber, Jack Hart, Bonnie Hart, Pleasant Hill Bank, Inc., Cass County Title are represented by Elvin Douglas, Box 280, Harrisonville, Missouri 64701; direct dial 329-9781, 816-884-3238; fax number 329-9782.

Defendant Grandview Bank & Trust (now Truman Bank), Steve Osman, President;

Defendant AMC, Ltd., Arnold M. Cook Associates, Inc., Arnold M. Cook, Barrry A. Cook, Iris B. Cook, Philip T. Goldstein, Thomas C. Mason, Emanuel Ruben are represented by Fred Northcraft, Smith, Gill, Fisher & Butts, 3500 One Kansas City Place, 1200 Main, Kansas City, Missouri 64105;

Defendants David L. Gibson Associates, Inc. and David L. Gibson, no one appeared and none of the attorneys who attended had any idea who was representing

them. Gibson Associates apparently is defunct but I don't know anything about David Gibson;

Winnebago Real Estate Sales and Management Company, Inc. was not represented at the conference and I don't know who is representing it. It may be defunct;

Alex Flemington apparently has never been served and no one has ever appeared for him;

Defendants Raines, Williams and Fehrman are represented by Don H. Jackson and John Lilla, 800 Bryant Building, 1102 Grand, Kansas City, Missouri 64106;

Defendant Bannister Bank was represented by Thomas H. Reppell, 12507 Grandview Road, Grandview, Missouri 64031; 761-6161;

Defendants Bank of Lee's Summit and Mission State Bank & Trust Company were not represented and no one has any information about who represents them;

Defendant Winnebago South Homeowner's Association, Inc. was not represented and is said to be defunct;

Defendant Vernon T. Wigglesworth was represented by Edward E. Schmitt, 1700 City Center Square, 1100 Main, Kansas City, Missouri 64105;

Plaintiffs are represented by Paul R. Lamoree and Thomas Ruzicka, Watson, Ess, Marshall & Enggas (Lamoree is in Missouri office at 500 United Missouri Bank Bank Building, 1010 Grand, Kansas City, Missouri 64106; Ruzicka is in the Kansas office at 130 N. Cherry, Box 550, Olathe, Kansass 66061).

*** 2) Very shortly, Elvin Douglas will file a Motion to Withdraw as counsel for the Steinhilbers. Please get that motion to Brenda as soon as you receive it because we want to send out a show cause order promptly.

*** 3) Within 30 days, the parties at the conference will submit a proposed Order to Show Cause to Juanita

(sic) Steinhilber. I assume that it will be sent directly to me but if it should get into your hands, please be sure to give it to Brenda immediately.

DBB/mmh

*** Emphasizing pertiment paragraphs, added.

MISSOURI STATUTES

DEBTOR-CREDITOR RELATIONS

§ 428.024. Transfers fraudulent as to present and future creditors. (L. 1992, S.B. No. 448, § A.)

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor;

(a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the bujsiness or transaction; or

(b) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

2. In determining actual intent under subdivision (1) of subsection 1 of this section, consideration may be be given, among other factors, to whether:

(1) The transfer or obligatoin was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation

was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

No. 99-982

In The

Supreme Court of the United States

JOHNITA F. STEINHILBER,

Petitioner,

v.

MICHAEL S. MCFARLAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS E. RUZICKA*
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**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26PP

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER WAS NOT DENIED A RIGHT TO A JURY TRIAL IN THE DISTRICT COURT AS THE REMEDIES SOUGHT AND GRANTED AGAINST HER WERE EXCLUSIVELY EQUITABLE IN NATURE?

II. WHETHER PETITIONER WAS DEPRIVED OF A FULL, FAIR AND PROPER JURY TRIAL BY REASON OF THE DISTRICT COURT'S USE OF FACTUAL STIPULATIONS IN MAKING CERTAIN PRETRIAL AND TRIAL RULINGS?

LIST OF PARTIES

Johnita F. Steinhilber, Petitioner; Robert V. Steinhilber, co-defendant (and Petitioner in Case No. 99-827 presently before the Court); Winnebago South, Inc., a Missouri corporation, co-defendant; Michael S. and Donna C. McFarland, Robert F. and Cheryl Morgan, Norman R. and Phyllis A. Cates, Wayne E. and Annabell Lasley, Richard A. and Bonnie L. LaPointe, Glen G. and Opal Pittman, G.H. and Harriett L. Ricker, Orson A. and Glenna M. Rau, Gary and Carolyn Sue Spears, Paul and Juanita L. Schafer, Robert J. and Anna E. Schumacher, Christ and Sophia Skiriotis, S.N. and Irene P. Whitcanack, Arthur and Kathleen Zago, Respondents.

CORPORATE DISCLOSURE

There are no parent corporations involved, and there are no publicly held companies involved, only the privately held corporation, co-defendant Winnebago South, Inc.

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The Opinions below are attached to petitioner's Petition at Appendices 1, 2 and 3.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on August 11, 1999. A Petition for Rehearing was filed and the Order denying the Petition was entered September 16, 1999. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner adequately sets forth the constitutional and statutory provisions involved in this Petition.

STATEMENT OF THE CASE

This cause comes before this Court after having endured a long and twisted legal path. This case was originally filed in December of 1971. The fundamental claim made in this case is based upon the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 U.S.C. § 1703, *et seq.* ILSA became effective April 28, 1969. Petitioner Johnita F. Steinhilber ("JFS") and her husband, co-defendant Robert V. Steinhilber ("RVS") and their company, Winnebago South, Inc. ("WSI"), were developing a real estate subdivision and in doing so, filed a Statement of Record and

Property Report (the "Property Report") pursuant to the requirements of ILSA. The development failed, this case was filed and the district court appointed a Receiver of WSI's assets.

On March 7, 1973, this case was designated to proceed as a class action under Fed.R.Civ.P. 23(b)(1) and (2). The class was later redefined to those persons who purchased lots between April 28, 1969 and October 22, 1971.

Discovery proceeded, and after a significant delay in the prosecution of the case, motions for partial summary judgment filed by virtually all of the parties were briefed and heard by the district court. The district court ruled on the summary judgment motions, making certain determinations from which RVS and JFS appealed, and the matter thereafter eventually (and finally) went to a jury trial. The district court presided over a twenty-eight day jury trial (conducted between November 16, 1995 and February 13, 1996) which resulted in an advisory verdict against RVS on all five counts related to him and against JFS on four out of five counts related to her. After numerous post-trial motions, the District Court filed its Judgment in a Civil Case on March 14, 1997, which was entered on March 19, 1997. RSV thereafter filed a Motion For Judgment As A Matter Of Law under Fed.R.Civ.P. 50(b), or, in the alternative, for a New Trial, under Fed.R.Civ.P. 59. JFS only filed a Motion for Judgment as a Matter of Law. The district court denied both motions on June 30, 1997. On July 24, 1997 RVS and JFS filed Notices of Appeal to the Eighth Circuit Court of Appeals. The appeals were briefed by RVS and JFS separately, but plaintiffs filed a consolidated reply brief. The court of appeals issued its opinion affirming the district court's

actions on August 11, 1999. On September 16, 1999, the appellate court entered an Order denying RVS and JFS's Petitions for Rehearing.

ARGUMENT

I. THE DISTRICT COURT'S USE OF FACTUAL STIPULATIONS OF THE PARTIES WAS PROPER AND DID NOT ACT TO DENY PETITIONER HER RIGHT TO JURY TRIAL

JFS's Petition for a Writ of Certiorari is just the latest chapter in this unfortunate piece of litigation which has trudged through the courts for the past twenty-eight years. Like almost everything else filed by JFS, the Petition has no merit. JFS characterizes the district court and the Eighth Circuit Court of Appeals' actions as an "embarrassment" and a "scandal in the administration of justice". This hyperbole no doubt is a result of JFS's frustration at having finally been held accountable for her fraudulent actions which occurred in the late 1960's and early 1970's. Nothing set forth in the Petition warrants review by this Court. The Eighth Circuit correctly recognized that the district court's actions were warranted and further, that JFS's efforts at attempting to appeal the same were so deficient as to render it impossible for any court to provide any further meaningful review.

JFS asserts three "reasons" to support her Petition, basically parroting the language of Supreme Court Rule 10. She also presents six "questions" for the Court which presumably relate to the reasons supporting her Petition. Many of the questions raised by JFS deal with the district

court's alleged denial of her right to a jury trial (despite receiving a mostly unfavorable verdict after participating in a twenty-eight day jury trial which was deemed "advisory" in nature). As will be discussed later, JFS did not have a right to a jury trial as the remedies sought and granted against her were exclusively equitable in nature. An examination of JFS's brief to the Eighth Circuit reveals that the true dispute she has with the district court and now the Eighth Circuit is the district court's use of certain stipulated facts in making pretrial rulings, which in turn had the effect of taking undisputed factual issues away from the trier of fact.

The Eighth Circuit correctly ruled that "the Steinhilbers were not denied their right to a jury in the district court, as the remedies sought and granted against them were equitable in nature. *See, Kerr v. Charles F. Vatterott & Co.*, No. 98-1677, 1999 WL 493996, at 5 (8th Cir. July 12, 1999) [now found at 184 F.3d 938]; *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir. 1996)." The court then found that it was unable to review any of the other fact-based claims raised by RVS and JFS because the Steinhilbers failed to submit the *necessary* transcripts pursuant to Fed.R.App.P. 10(b)(2).

Since the primary focus of JFS's Petition and prior appeal relates to the district court's use of certain stipulated facts, plaintiffs will address this issue first, and then discuss the remaining questions presented as needed. Simply put, the controversy relating to the stipulated facts does not rise to the level of importance contemplated by Supreme Court Rule 10. The court of appeals has not entered a decision in conflict with another circuit or with this Court nor does the court's decision call for an

exercise of this Court's supervisory powers. As such, this case is not a candidate for the issuance of a writ of certiorari.

On June 30, 1981, a document labeled "Pre-trial Brief of the Parties" was filed with the district court by counsel for plaintiffs. (Plaintiffs' Eighth Circuit Appendix, pp. 1-159) (hereinafter, the "Pretrial Brief"). The Pretrial Brief states in the first paragraph that, "Plaintiffs submit the enclosed revised statements of fact agreed between or among the parties and the parties' respective statements of contested issues of fact and law". The first section of the Pretrial Brief is entitled "Statements of Fact Stipulated Among Plaintiffs and Defendants Winnebago South, Inc., Robert V. Steinhilber, Jack O. Hart, Bonnie Hart and Johnita Steinhilber." The factual statements about which JFS complains are contained in this section of the Pretrial Brief (hereinafter, the "Factual Stipulations"). *Twelve years later*, on August 12, 1993, RVS and JFS each filed a Motion To Set Aside Stipulations. The parties all filed voluminous briefs with respect to the motions to set aside the Factual Stipulations, and the district court heard five days of testimony on the issue during the week of March 21, 1994, and two days of testimony on July 18 and 19, 1994. The only transcript of any of these proceedings is found in Plaintiffs' Eighth Circuit Appendix, pp. 160-166, which only contains the district court's ruling on the matter. In light of the fact that the district court's ruling on this issue resulted from a "mini-trial" which included seven days of testimony and ultimately was supported by the district court's finding of facts, the appropriate standard of review for the appellate court was whether the district court committed "clear error". *See, Cooper Tire &*

Rubber Company v. St. Paul Fire and Marine Insurance Company, 48 F.3d 365 (8th Cir. 1995). Further, the only way for the appellate court to review this issue would be to read the entire transcript of the testimony, which was not provided by JFS.

The district court concluded that the Factual Stipulations were indeed stipulations of fact between plaintiffs and defendants, were admissions of fact by defendants and were also facts determined as a result of judicial proceedings. The district court explained its reasoning as follows:

> Furthermore, the brief labels the factual statements as statements of fact stipulated among plaintiffs and defendants Robert Steinhilber and Johnita Steinhilber and others.
>
> These are the types of assertions that fairly call for a timely response by the Steinhilbers or their counsel if the Steinhilbers do not agree that the factual statements are indeed stipulations agreed to by them. However, the claimed stipulations were not objected to by the Steinhilbers or their counsel until over twelve years after the pretrial brief was filed. Because objections were not filed in a timely manner, I can conclude one of two things: 1) the stipulations were indeed intended by defendants and/or their counsel to be binding stipulations of fact; or 2) the factual statements contained in the stipulations are deemed admitted by defendants and are thus binding.

(Plaintiffs' Eighth Circuit Appendix, p. 163).

The district court further referred to the pretrial orders entered by the court which required the filing of

statements of stipulated fact. The November 25, 1980, Final Pretrial Order required defendants to deny all statements of fact that they did not agree with. Failure to deny resulted in the facts being uncontroverted. The district court therefore ruled that the Factual Stipulations were binding on the parties. Absent a transcript of the testimony used by the district court in rendering its decision on the Stipulated Facts issue, the appellate court was simply unable to provide a review of this issue and the district court's ruling was properly allowed to stand.

II. PETITIONER WAS NOT DEPRIVED OF A FULL, FAIR AND IMPARTIAL JURY TRIAL BY REASON OF THE DISTRICT COURT'S PRETRIAL RULINGS

A careful review of the above arguments raised by JFS once again reveals that the heart of the dispute with the district court's actions revolves around the initial decision on July 19, 1994, wherein the district court found that the Factual Stipulations, for good cause shown, were indeed factual stipulations, would be binding upon the parties, and used during the course of the trial as all factual stipulations should be used. The correctness of the district court's decision is analyzed in detail above. The district court's conclusion necessarily had some impact on related pretrial rulings and the course of the jury trial which followed. The district court encouraged the parties to work toward factual stipulations for a reason. This case, as in many other cases, involves numerous facts about which the parties do not have a disagreement. A complex case like the one at bar indeed contained numerous facts upon which the parties, after a lengthy

process, were able to agree. The agreement resulted in detailed factual stipulations. Once the parties agreed to those facts, they were not open to subsequent challenge (especially twelve years after the stipulations were filed of record with the court). It was therefore proper for the district court to advise the jury of the Factual Stipulations (they were part of the evidence) and to further advise the jury that RVS and JFS had agreed to the Factual Stipulations (since the district court had found that either they had agreed, or their counsel had agreed to the stipulations).

Given the state of the record on appeal, it is clear that the district court reached a correct decision with respect to the Factual Stipulations and did not commit "clear error". It is abundantly clear that the Eighth Circuit's affirmation of that ruling certainly does not rise to the level of an issue contemplated by Supreme Court Rule 10.

III. THE DISTRICT COURT'S RULING ON THE SUMMARY JUDGMENT MOTIONS WAS PROPER

JFS attacks the district court's granting of partial summary judgment on a number of fronts. Her primary argument is perhaps the most confusing. JFS appears to argue that the district court erred by granting *partial* summary judgment under the auspices of Fed.R.Civ.P. 56(c), and implies that partial summary judgment is not available under the rules. A fair reading of Rule 56(c) reveals that it provides instruction as to the mechanism of how to file a motion for summary judgment and how thereon to proceed. Fed.R.Civ.P. 56(d) in turn provides

instruction on how to proceed "[i]f on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary . . . " – in other words, if the court grants *partial* summary judgment. The district court in the present case granted partial summary judgment and properly made findings of fact about which no material question of fact remained. The district court then properly used those findings at trial by instructing the jury of those facts which were no longer before them. If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986); *see also, City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Instructing the jury on matters properly determined via the summary judgment process does not usurp a jury's role, as argued by JFS. The jury has no role since no material question of fact remains with respect to the court's specific findings. Petitioner then attempts in her Petition to get into the detailed findings made by the district court in its summary judgment motion. Such a factually based review is not the proper use of this Court's resources. *See*, Supreme Court Rule 10.

IV. PETITIONER WAS NOT DENIED A FULL, FAIR AND IMPARTIAL JURY TRIAL BY REASON OF THE DISTRICT COURT'S USE OF THE FACTUAL STIPULATIONS IN DIRECTING THE COURSE OF THE JURY TRIAL

Once again JFS raises a "question" which directly relates to the district court's use of the Factual Stipulations. Specifically, JFS challenges the district court's decision to advise the jury of certain stipulated facts and to prevent JFS and her co-defendants from re-litigating those facts at trial. Once the validity of the district court's actions concerning the Stipulated Facts is affirmed, the various challenges to the use of those facts in pretrial and trial rulings by the district court is really moot. The district court is entitled to use factual stipulations to streamline the presentation of a case to a jury. The management of the case in this manner, and the Eighth Circuit's approval of the same, does not raise issues which rise to the level contemplated in Supreme Court Rule 10 which would necessitate further review or involvement by this Court.

V. SINCE ONLY EQUITABLE ISSUES REMAINED IN THE CASE, THE DISTRICT COURT DID NOT DEPRIVE PETITIONER OF A JURY TRIAL

JFS's next "question" again raises the issue of whether the district court deprived her of a full, fair and impartial jury trial. When more closely examined, however, this issue is comprised of two chief complaints: The district court's decision on the Factual Stipulations (which was discussed in detail above – and will not be

repeated here) and the district court's decision, sitting as a court of equity presiding over the receivership of the assets of Winnebago South, Inc., canceling Winnebago South's Note and Deed of Trust given to JFS. The key argument appears to be that the repercussions from those two decisions had a dramatic impact on the course of events at trial and therefore allegedly deprived JFS of a "full, fair and impartial jury trial".

The decision JFS actually attempted to seek relief from is found at *McFarland v. Winnebago South, Inc.*, 863 F.Supp. 1025 (W.D.Mo. 1994). That decision is well reasoned, never properly appealed, and was rightfully left undisturbed by the Eighth Circuit.

The District Court based its decision on this issue on evidence gathered during the week-long evidentiary hearings held in March and July, 1994, as well as the Factual Stipulations. *McFarland*, 863 F.Supp. at 1027. The Factual Stipulations are in the record on appeal; the *full* transcript of the lengthy evidentiary hearing is not. The appellate court, no doubt after reviewing the Factual Stipulations, came to the same conclusion reached by the district court and found only equitable issues remained, thereby nullifying JFS's reliance upon this Court's decision in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959) and the Eighth Circuit's decision in *Brownlee v. Yellow Freight Systems, Inc.*, 921 F.2d 745 (8th Cir. 1990). The appellate court correctly found that "the Steinhilbers were not denied their right to a jury trial in the district court, as the remedies sought against them were equitable in nature".

Indeed, there is *nothing* in the record to rebut any of the factual findings articulated by the district court in its ruling wherein it reached the same conclusion. Any factual distinctions raised by JFS in her brief are wholly devoid of support in the record on appeal.

It is readily apparent that the District Court had the legal authority to enter the orders canceling the Note and Deed of Trust. The District Court properly concluded:

> A federal district court presiding over an equity receivership has extremely broad power to supervise the receivership and protect receivership assets. 7 Moore's Federal Practice, ¶ 66.08[4], (citing *Bein v. Robinson*, 208 U.S. 423, 28 S.Ct. 379, 52 L.Ed. 556 (1908); *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *SEC v. Wencke*, 783 F.2d 829 (9th Cir. 1986); *SEC v. Universal Financial*, 760 F.2d 1034 (9th Cir. 1985); and *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984)). Specifically, the receivership court has the power to use summary procedures in allowing, disallowing, and subordinating claims of creditors, so long as creditors have fair notice and a reasonable opportunity to respond. *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir. 1984).
>
> Because a receivership court sits in equity, it also has the authority to cancel instruments and contracts, including notes and deeds of trust, as part of its equitable powers. *See Cleary v. Cleary*, 273 S.W.2d 340, 345 (Mo. 1954); *Butler County, Missouri v. Campbell*, 353 Mo. 413, 182 S.W.2d 589, 592 (1944); *Signature Pool v. City of Manchester*, 743 S.W.2d 538, 541 (Mo.Ct.App. 1987); 13 Am.Jur.2d, *Cancellation of Instruments*, § 5. A jury

> trial is not available when a party seeks the cancellation of an instrument. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984); *Spaunhorst v. Spaunhorst*, 650 S.W.2d 650, 654 (Mo.Ct.App. 1983); 13 Am.Jur.2d, *Cancellation of Instruments* § 62.

McFarland v. Winnebago South, Inc., 863 F.Supp. at 1034. JFS fails to offer any persuasive legal authority to rebut the district court's exhaustive and compelling recitation of legal authority for its course of action.

At trial, plaintiffs were not both seeking to rescind their land sales contracts and obtain restitutionary relief from some defendants, and seeking to affirm the very same contracts and obtain compensatory damages from other defendants. As the Eighth Circuit noted in *Slater v. KFC Corp.*, 621 F.2d 932, 935 (8th Cir. 1980): "Missouri law affords an alleged fraud victim an option: he may retain whatever he has received and sue on the contract, or he may return what he has received and sue for rescission and restitution." *See also Cottonhill Investment Co. v. Boatmen's National Bank*, 887 S.W.2d 242, 744 (Mo.App. 1994) ("Where fraud is present a party may either seek to affirm the contract and sue for damages or may disaffirm the contract, including a deed, and sue for rescission."); 37 C.J.S. *Fraud*, § 65 ("One injured by fraud may either elect to accept the situation and recover his damages or he may repudiate the transaction and seek to be placed in status quo, but he cannot do both.")

Under the Interstate Land Sales Act, a defrauded lot purchaser may bring an action in equity – such as for rescission and restitution – against any person or entity that meets the criteria for culpability under the Act.

Plaintiffs consistently maintained throughout the pre-trial proceedings and throughout the trial that the jury could only be advisory as to plaintiffs' equitable claims for rescission and restitution. Only by obtaining an order for rescission would plaintiffs and the Receiver begin to be able to reassemble all of the land into a single, unencumbered parcel which could then be liquidated to provide at least a portion of the restitutionary remedies to which plaintiffs are entitled. Since plaintiffs were exclusively seeking equitable, rather than legal, relief, JFS did not have a right to a jury trial with respect to those claims or remedies. The district court and the Eighth Circuit correctly reached this conclusion.

VI. PETITIONER'S OWN FAILURE TO PROVIDE AN ADEQUATE RECORD ON APPEAL, INCLUDING A FULL TRANSCRIPT OF MATTERS SOUGHT TO BE REVIEWED, DOES NOT PROVIDE GROUNDS FOR FURTHER REVIEW BY THE SUPREME COURT

The appeal briefs submitted by JFS and RVS to the Eighth Circuit, and the lack of record on appeal transmitted to the appellate court made it virtually impossible for plaintiffs to respond to the appeal and *defacto* impossible for the appellate court to conduct any meaningful review. For example, RVS's brief contained a section labeled "Background Facts", which was adopted in *toto* by JFS in lieu of setting forth her own required Statement of Facts. Beginning at page two of his brief, and continuing thereafter for a full *twenty pages*, RVS provided a comprehensive narrative of what *he* believed the relevant background facts to be and then, incredibly, attached an

affidavit wherein he swore that the facts were true. The affidavit is preceded by the telling statement: *"All of the facts in this 'Statement of the Case' were offered in evidence, with supporting documentation for practically all, but the vast majority of RVS's testimony and other evidence was denied admittance, and most of the remaining was 'chopped-up' by interruptions and 'picked to pieces', so to speak, by the Court and Plaintiffs' Counsel with Court approval."* (emphasis in original). None of the "facts" set forth by RVS (and thereafter adopted by JFS) were referenced to the record on appeal as required by Fed.R.App.P. 28. Indeed, it would have been impossible since there is *no* credible record on appeal of evidentiary matters by reason of RVS and JFS's refusal to provide a *full* transcript. It is appellants' responsibility to provide the appellate court with a proper record on appeal. In the absence of a transcript, certain issues are forfeited by appellants since the appellate court is unable to review the evidentiary record upon which the district court based its rulings. *See*, Fed.R.App.P. 10(b)(2), "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant *shall* include in the record a transcript of all evidence relevant to such finding or conclusion." (emphasis supplied). *See also, Schmid v. United Brotherhood of Carpenters and Joiners of America*, 827 F.2d 384, 386 (8th Cir. 1987) ("On the basis of the record before the court, it is impossible to determine the accuracy and context of the judge's comments allegedly indicating bias, evaluate the challenged evidentiary rulings, or rule on the weight of the evidence."); *Syncom Capital Corporation v. Wade*, 924 F.2d 167 (9th Cir. 1991) (Appeal dismissed because of the

appellant's failure to provide a trial transcript); *United States v. Vasquez*, 985 F.2d 491 (10th Cir. 1993) (Failure to file transcript precludes review of trial court's evidentiary ruling; challenges to admission of evidence will not be considered on appeal in absence of record containing those portions of transcript on which appellant relies); and, *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569 (7th Cir. 1995) (Failure to comply to with federal rule requiring transcript to be included in the record on appeal where a party challenges that insufficient evidence supports the verdict is ground for forfeiture of the claim and is also grounds for sanctions). Further, an appellate court cannot consider evidence that is not contained in the record below. *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). The affidavit contained in RVS's brief (adopted in full by JFS) is such impermissible evidence which was properly ignored by the appellate court.

Even if a transcript had been available to the appellate court, RVS already acknowledged that the "vast majority" of the "testimony" upon which he based his statement of facts was denied admission into evidence. He basically attempted to tell the appellate court, for the first time, what he allegedly *tried* to get before the district court and the jury. As such, it is a highly improper post-trial proffer of evidence to an appellate court. While the district court's ruling on the admissibility of evidence may be a proper issue for appellate review, it must be presented to the appellate court properly. *See*, Fed.R.Evid. 103. RVS's statement of facts is *not* the proper way to present "facts" in an appellate brief and was properly ignored by the Eighth Circuit. While courts may apply

less stringent standards to parties proceeding pro se[1] than to parties represented by counsel, pro se parties must still brief issues and *reasonably* comply with standards for appellate briefs. *See, Grand v. Cuellar, R.A.*, 59 F.3d 523 (5th Cir. 1995) (Pro se litigants, like all other parties, must abide by the Federal Rules of Appellate Procedure).

Petitioner was not "deprived" of proper review by the Eighth Circuit. Any deficiency in the appellate court's ability to review the district court's actions is a direct result of her failure to provide a sufficient record. Such self inflicted hindrances cannot form the proper basis for review under Supreme Court Rule 10.

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[1] It should be noted that both RVS and JFS are licensed attorneys. Thus, they should not be treated like typical pro se litigants. In fact, a quick search of cases in the Westlaw database reveals that RVS is no stranger to the courthouse. *See, Robinson v. Morrison, Inc.*, 501 So.2d 1323 (D.Ct.App.Fla. 1987) (RVS counsel for appellant); *Trinh Trung Do v. Amoco Oil Company*, 510 So.2d 1063 (D.Ct.App.Fla. 1987) (RVS counsel for appellant); *Steinhilber v. Thompson*, 1991 WL 219393 (W.D. Mo. 1991) (RVS pro se); *Steinhilber v. Watson, Ess, Marshall & Enggas*, 141 F.3d 1170, 1998 WL 115804 (8th Cir. 1998) (RVS pro se); *Steinhilber v. Lamoree*, 825 F.Supp. 1003 (D.Ct. Fla. 1992) (RVS pro se); *Steinhilber v. Lake Winnebago Home Owner's Association*, 1991 WL 220249 (W.D. Mo. 1991) (RVS pro se); *McFarland v. Winnebago South, Inc.*, 863 F.Supp. 1025 (W.D.Mo 1994) (RVS pro se); *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973) (RVS criminal defendant); *In re Steinhilber*, 507 U.S. 907, 113 S.Ct. 1369 (1993) (RVS petitioner – not disclosed in report whether RVS represented himself in this Petition for Writ of Mandamus before the United States Supreme Court, although it falls within the time span in which he represented himself pro se in the instant case as well as others).

CONCLUSION

WHEREFORE, for the reasons stated above, respondents respectfully pray this Court deny JFS's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 99-982

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

In re Johnita F. Steinhilber,

Petitioner,

v.

Michael S. McFarland, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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16pp

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DEPRIVED OF A FULL, FAIR AND IMPARTIAL SEVENTH AMENDMENT JURY TRIAL BY THE DISTRICT COURT MAKING PRETRIAL ORDERS BASED UPON FINDINGS OF FACT IT MADE PRIOR TO TRIAL BY JURY.

II. WHETHER IT WAS AN ERROR AND ABUSE OF DISCRETION FOR THE COURT TO RELY ON CONTROVERTED ALLEGED "STIPULATIONS" IMPROPERLY FILED BY RESPONDANTS/PLAINTIFFS MORE THAN FOURTEEN YEARS PRIOR, AND WITHOUT ASSENT OF PETITIONER OR HER THEN-ATTORNEY, AS THE BASIS FOR ITS PRE-JURY TRIAL ORDERS PROHIBITING PETITIONER FROM PRESENTATION OF TESTIMONY AND EVIDENCE AND ARGUMENT TO THE JURY, AND PROHIBITING CONSIDERATION OF DEFENSIVE MATTERS BY THE JURY.

III. WHETHER THE DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT AGAINST PETITIONER 156 DAYS AFTER ARGUMENT ON THE MOTION WAS ERRONEOUS, INASMUCH AS IT WAS BASED UPON

THE COURT'S PRE-JURY TRIAL FINDINGS OF FACT, AND VIOLATED RULE 56(c), F.R.C.P.

IV. WHETHER PETITIONER WAS DEPRIVED OF A FULL, FAIR AND IMPARTIAL SEVENTH AMENDMENT JURY TRIAL BY THE DISTRICT COURT INSTRUCTING THE JURY THAT THEY WERE BOUND BY DETERMINATIONS (FINDINGS OF FACT) ALREADY MADE (TO-WIT: THOSE MADE BY THE DISTRICT COURT PRIOR TO JURY TRIAL), AND BY BARRING PRESENTATION BY PETITIONER OF TESTIMONY AND DOCUMENTARY EVIDENCE TO THE JURY TO REFUTE THE FINDINGS OF THE DISTRICT COURT.

V. WHETHER THE DISTRICT COURT VIOLATED THE RULE OF LAW ESTABLISHED BY THE SUPREME COURT IN BEACON THEATRES, INC. v. WESTOVER, 359 U. S. 500 (1959), AND THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN BROWNLEE v. YELLOW FREIGHT SYSTEM, INC., 921 F.2d 745 (1990), REQUIRING TRIAL OF ALL ISSUES TO THE JURY, LEGAL BEFORE EQUITABLE.

VI. WHETHER PETITIONER WAS DEPRIVED OF AN ADEQUATE/PROPER REVIEW AT THE CIRCUIT COURT OF APPEALS LEVEL BY REASON OF THE EIGHTH CIRCUIT COURT RULING THAT SHE DID NOT SUBMIT NECESSARY TRANSCRIPT (TRANSCRIPTS OF THE ENTIRE DISTRICT COURT PROCEEDINGS), WHEN, IN FACT, THE RECORD UP FOR REVIEW INCLUDED SEVERAL THOUSAND PAGES OF TRANSCRIPTS AND DOCUMENTS WHICH PROVIDED THE COURT WITH MORE THAN AMPLE DOCUMENTATION TO ADEQUATELY ADDRESS THE MATTERS WHICH PETITIONER APPEALED.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF

Respondents' Statement Of The Case

Requires correction of material errors of fact stated therein (P. 1, ¶ 1):

> WSI (Winnebago South, Inc.) is referred to as "their company", i.e., that of Robert V. Steinhilber (RVS) and Petitioner JFS. (Emph. added.)

Petitioner was never an officer, director, stockholder, employee, agent or possessor af any real or apparent authority connected with the operation of WSI.

> "Their company ..... filed a Statement of Record and Property Report": (Emph. added.)

Petitioner sold her tract to WSI well before ILSA became effective and had no participation with the filings nor any familiarity with them until Respondents/Plaintiffs (Respondents) action was revived in 1992, by which time she had become an attorney (1980).

Page 2, paragraph 3: Motions for Summary Judgment were filed by defendants and for Partial Summary Judgment by Respondents in Feb./Mar., 1995; after oral argument was heard, the District Court ruled from the bench, denying the motions of all defendants, but withheld ruling on Respondents motion for Partial Summary Judgem'ent against Petitioner and WSI, stating only that those "will not be ruled upon today".

The District Court delayed those ruling - against defendants, until November 3, 1995 (156 days), just 3 days before pretrial conference to begin for scheduled jury trial on November 13, 1995. The Court's Order made findings of fact on issues reserved for a jury under Seventh Amendment trial rights, and it was only then that defendants had opportunity to appeal - by Petition for a Writ of Mandamus to the Eighth Circuit Court of Appeals. The District Court refused to certify for immediate appeal. The Petition was denied.

> ".....(J)ury trial resulted in an advisory verdict":

The District Court, which attempted to reserve a right to

designate the jury as only advisory after verdicts, a proposition to which all defendants refused to assent as required by F.R.C.P. Rule 39 (a) (1). Post-trial briefs by the parties resulted in the District Court's Order that: "the dfts. had a 7th Amendment right to a jury trial". (6-3-96 Docket Sheet Entry.)

Respondents' Brief makes five affirmative statements in support of the actions of the District Court, and a sixth contending that the Eighth Circuit Court was correct in denying review. Their Statements I and IV are essentially the same, arguing that the District Court's 1994 ruling to bind Petitioner to alleged stipulations of fact - unsigned by any party or counsel, including Respondents' Counsel filed in 1981, and disavowed as final by all, including Respondents' Counsel and two prior judges - did not by its use in pretrial and trial order, act to deprive Petitioner of Seventh Amendment jury trial.

Statements II and III argue that pretrial of equitable and legal issues based on the disputed stipulations did not deprive Petitioner of a "full, fair and impartial jury trial".

Statement V argues that, since the District Court had already pretried the legal and equitable issues mandated to be tried by jury, it had reduced the eventual "jury trial" to an equitable issue only, thereby "nullifying" Petitioner's rights established by the Supreme Court and the Eighth Circuit Court precedents.

Finally, Statement VI that Petitioner's failure to purchase a full transcript of all proceedings rendered the record inadequate for review by the Eighth Circuit Court and ineligible for review of deprived jury trial rights by the Supreme Court.

Respondents have not confronted any cases or other authority cited by the Petition on legal standards for determining right to Seventh Amendment jury trial as established by Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) and its progeny including Brownlee v. Yellow Freight Systems, Inc., 921 F.2d 745 (8th Cir. 1990).

Respondents seek to distinguish the conduct of trial of this case in District Court, not by cases or authority holding contrary to Beacon's established principles governing Seventh Amendment jury trial rights, but by postulating a novel theory that Beacon, et al. can be nullified simply by overriding the controlling precedents as if they have no force and effect in establishing a rule of law and as if creation of a record voluminous enough would insulate against review -- by imposing impossible financial burdens upon appellants and intolerable burdens upon appellate courts. (Respondents', p. 11.)

Respondents argue that, although F.R.C.P. 42(b) and Beacon prohibit separate trial of legal and equitable issues in violation of Seventh Amendment jury trial rights, and Granfinanciera v. Norberg, 492 U.S. 33, 42, 106 L.Ed.2d 26 (1989), specifically applies this prohibition to actions seeking cancellation of alleged fraudulent conveyance, characterization of the separately held trials as "mini-trials" makes them less violative of a constitutionally guaranteed right (Pet. Writ, 14, 15, 20).

It was the District Court itself which informed the jury that its pretrial orders of cancellation and Summary Judgment were binding upon them in reaching their verdicts as facts conclusively established by a court in "another trial". And in response to objection by co-defendant Grandview Bank to the prejudicial effect on the jury, of these orders (and the "stipulations" upon which they were based), the District Court argued that they involved only "a trial against the Steinhilbers" in which the Court sought to give the Plaintiffs the relief being sought", i.e., "the Plaintiffs' desire to clear the second deed of trust from the property". (Pet. Appellate Brief Ex. Book I, Ex. pp. 87 & 97, trans. 11-20-93.)

It is clear that the District Court viewed the pretrial Order as a separate trial to collaterally estop any profer by defendants of any evidence controverting either the alleged stipulations of fact, the conclusions reached by the Court, or reference to the Court's part in the "other trials", including the Partial Summary Judgment Order. (Pet. Appell. Brief Ex. Book I, Ex. 97, 11-20-95 trans.)

This is precisely the result prohibited by Beacon and progeny as an unconstitutional deprivation of a Seventh Amendment jury trial right.

Respondents do not argue that the holdings of the Beacon and Brownlee line of cases do not apply to issues of the Complaint as brought by them and as defined by the District Judge in its Second Amended Certification as a class-action filed on June 6, 1980. Instead, they seem to argue that, where, as here, a District Court chooses to disregard controlling law and Federal Rules of Procedure by holding separate bench trials of issues, mandated for jury trial, and where, as here, interlocutory review of those errors is evaded, and the Court thereafter (however erroneously) declares that "only equitable issues remained", a party's right to rely on Beacon has been successfully nullified. (Respondents, at p. 11.)

If Respondents are correct, this new right might be called "jury right nullification", a clever procedural strategy that trumps both the provisions of the Constitution and the legal principle of stare decisis.

If Respondents are correct, the strategy can also succeed in lessening the burden on appellate courts. A succession of separate trials, rather than one mandated jury trial, creates an unwieldly record for review and, if absence of full transcript is deemed controlling and fatal, even where there is record evidence a Seventh Amendment jury trial right has been denied, review can also be denied, and, perhaps, the jury right nullification strategy ratified for future management of complex litigation.

Respondents' Statement VI, (1) asserts that Petitioner's failure to provide an adequate record on appeal, (2) including a "full transcript of matters sought to be reviewed", and (3) made it "virtually impossible for the Plaintiffs to respond" and defacto "impossible for the appellate court to review". (Respondents at pp. 14-17.)

(1) "Inadequate record on appeal": The entire District Court record was transmitted to the appellate court. (See partial list of contents, Peti., p. 10.) Respondents

had the same records as Petitioner and, prior to transmission, more convenient access to those in the Court record, including access to transcripts ordered by the parties and the Court.

(2) "(F)ull transcript of matters sought to be reviewed": More than 100 pages of transcript relating to "matters sought to be reviewed", i. e., deprivation of Seventh Amendment jury trial, were included as Exhibits to Petitioner's Brief on appeal, all relating directly to the District Court's estoppel of rights of defendants' to present testimony and evidence on the issues raised in Respondents' Complaint and use by the Court and Respondents of pretrial orders to mislead and prejudice the jury. (Petitioner's Appellate Brief Exhibit Books I and II.)

Not included in Petitioner's Exhibits were an additional 2,046 pages ordered and designated by her involving 22 different hearing dates, 47 sets of Court-deputy minute sheets for as many Court sessions. Respondents' motion to require full transcripts was granted, and use of the designated pages was denied.

(3a) Lack of full transcrips made it "virtually impossible for Plaintiffs to respond": As aforesaid, Respondemts had the same records as Petitioner, and were free to order any and all transcripts - and be reimbursed if they prevailed. Respondents had three firm-attorneys in the courtroom at all times, with additional as they deemed necessary, plus support staff and at least three experts. Petitioner had and has no staff, her own notes and a portable word processor - if whining is material to this appeal. (See footnote 1, Respondents at p. 17.)

(3b) Lack of full record and transcript made it "defacto" impossible for the appellate court to conduct any meaningful review" ("of matters sought to be reviewed").

Again, the full District Court record was submitted; specific pleadings, orders, transcripts and documents were attached to Petitioner's Brief as Exhibits for the convenience of the appellate court - all relating to the matters sought to be reviewed, i.e., deprivation of a full and fair

Seventh Amendment jury trial on all the issues raised by Respondents.

Further, evidence that the District Court wrongfully abrogated Petitioner's right to jury trial does not depend on a transcript of rulings on admissibility or sufficiency of evidence, as Respondents imply by cases they cite, which cases were dismissed on appeal because transcripts were required.

The very actions of the District Court in preempting and trying issues required to be tried by jury is the de-facto evidence that the rule of law was violated. The District Court made findings of fact from disputed statements of fact and drew inferences in making conclusions from them, that only the jury was entitled to make under the controlling precedents of the Supreme Court and the Eighth Circuit Court of Appeals.

The Respondents assert that the ruling stipulations was correct. The ruling binding Petitioner to disputed stipulations, upon which the entire trial proceedings were based, is not a matter to be resolved by transcript as asserted. (Resp., p. 7.). The appellate court received the District Court record of Final Pretrial Order of November 11, 1980, and Petitioner included a full copy in Exhibit Book I, # 130-143. The provisions of the Order make patently clear the error of the Court's ruling and the indisputable evidence that Petitioner never failed (as alleged by Respondents) to deny erroneous statements and did not fail to comply with the Orders requirements in Part I, paragraphs D and E; that she submitted the narrative statememt which either admitted or denied each separate sentence submitted in Respondents' pretrial brief, as irrefutably shown by the Docket Entry on 2-10-81, and by Exhibits 117-129 of Petitioner's Appellate Brief. Additional evidence submitted to the appellate court includes Petitioner's initial Answer, her Summary Judgment pleading and Affidavit, and other Court record items.

Respondents have never denied that they failed to submit the required Reply Brief to defendants and were therefore not in compliance with paragraphs F and G of

Part I of the Order. They were, therefore, the only party against whom the sanctions provided in Part I, paragraph H, could have been applied. No transcript is required to verify that Respondents failed to abide by the Order. (Pet. at p. 21-23.) Thirteen pages relating to these facts, supported by Exhibit documents, were submitted to the Appellate Court, plus to the entire District Court record.

The District Court record on review, without transcript, was sufficient to prove procedural errors in violation of Seventh Amendment Jury Trial Right. Transcript is not needed to review the substantive errors of pretrial rulings and orders made by the District Court on issues rightfully tried by a Seventh Amendment Jury.

Stipulations Ruling. The terms of the 11-25-80 Pretrial Order provide the objective evidence that the only party subject to the paragraph "H" sanctions was the Respondents. Instead, its application to Petitioner deprived her of the right to contest controverted facts to a jury. The unagreed allegations of fact by Respondents then controlled the entire course of trial. This Order and the resulting compliance, or lack of it, by the parties, are matters of the record on appeal, and were separately provided to the Eighth Circuit Court as Petitioner's exhibits.

The Cancellation Order: Objective evidence in the form of contemporaneous value opinions by the original Receiver and others, including motions, affidavits and Conference transcript, are included in the record on appeal, together with the report by Grandview's Bank's expert witness, whose findings and conclusions on value rebutted those of the Cancellation Order. The jury believed him, as demonstrated by their verdicts for Grandview Bank.

The absence of transcript does not preclude the Appellate Court from determining that not only was the issue of the validity of the note and deed of trust wrongly usurped from the jury, its conclusions are objectively demonstrated to be erroneous upon de novo review.

The Order of Partial Summary Judgment: The legal issue of Petitioner's status under the ILSA definitions,

wrongly usurped the Partial Summary Judgment Order, is also demonstrably erroneous by the objective terms of those instruments evidencing Petitioner's lien rights - a part of the record on review and separately provided as to the Appellate Court as exhibits to her Brief. The rule of law governing the trial of legal issues raised by the statutory Complaint and the F.R.C.P. both demonstrate the error of usurping this issue from the jury. And the explicit terms of the debt agreements, as well as the limitations of the Plaintiffs' class to specific dates of purchase, all belie the conclusions of the District Court and are sufficient for de novo review based on objective fact, without resort to transcripts of testimony or oral argu- on admissibility or sufficiency of evidence.

There Never Was An Advisory Jury: Respondents assert that the "jury could only be advisory" as to Respondents' claims. (Respondents' V, pp. 13-14.)

The eleventh hour conversion of the scheduled jury trial to "advisory" status was a suggestion of the District Court in the week before trial was to commence. No defendant would assent. It was among the reasons Petitioner sought the Writ of Mandamus from the Eighth Circuit to enforce her Seventh Amendment rights. It was denied, but caused the District Court to believe "a" jury trial was required. That Court then ruled that there would be "a jury trial", but that the Court reserved the right to rule it "advisory" after the verdicts. Post trial briefs persuaded the Court that "the dfts had a 7th Amendment right to a jury trial". (Briefs and Petition for Writ were attached as exhibits to Petition for Rehearing by Panel.)

Respondents still maintain that the District Court and the Eighth Circuit Court correctly held that Petitioner did not have a right to any jury trial with respect to "those claims and remedies". The nature of Respondents' claims and remedies is addressed in Petition (pp. 16-19), and in the aforesaid briefs.

The District Court's Order made no such exception to its conclusion that defendants were entitled to a "7th Amendment" jury trial, and the very definition of a Sev-

enth Amendment jury trial right in the holdings of the Supreme Court and the Eighth Circuit Court on this issue is trial of all issues based on a common set of facts to a jury, with legal issues to be tried first. The Eighth Circuit Court made no such finding, stating only that Petitioner was not denied her right to a jury in the District Court "as the remedies sought and granted against (her) were equitable in nature".

There never was an option to try the issues of Respondents' Complaint by other than a Seventh Amendment jury. (Petition, pp. 10-21.) Respondents tried their claim of conspiracy to defraud lot purchasers, a legal issue, under the jurisdiction of the ILSA. The ILSA provided that they could sue at law or in equity, i.e., for recission or for damages on the contract. They chose to do both.

Respondents continue (citing cases at p. 13-14) to contend that after separate bench trials of equity and legal issues, they sought only equitable remedies, citing authority for purchaser's options to sue on the contract or for recission and restitution when claiming fraudulent inducement. Those, in fact, are the very options provided in the ILSA, but, with either choice, the measure of damages is the same, namely: "In no case shall the amount recoverable under this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs." (15 U.S.C. §1709(e)) (Petition, App. 6m, n.)

The ILSA provided a complete legal remedy under either option, and, "..... (I)n the federal courts, equity has always acted only when legal remedies were inadequate". (Beacon, at 509.)

Respondents tried an issue required to be tried in a court of law - for which the ILSA provided a complete legal remedy - with no distinction in the amount recoverable where demanding recission of the contract or damages and enforcement, a distinction without a difference in the ultimate remedy -- and without a difference in the requirement that the nature of the complaint required trial to a Seventh Amendment jury.

This litigation has been a factor of influence in Petitioner's life for 28 years. It has been a controlling factor for more than 8 years. And still there has been no review of procedural and substantive errors complained of.

During the course of judicial proceedings, Petitioner has been deprived of property rights and the right to unsullied reputation. A filing in an official reporter for the federal courts (judicially protected) contained statements defaming her character and falsely labeling the lawsuit as a receivership action when in fact, the matter covered in the reported decision was an equitable issue in aid of a statutory cause of action which the rule of law required to be tested for truth or falsity by a jury.

Petitioner lawfully acquired real property, lawfully sold it and lawfully retained secured lien rights. All lawful rights accruing from her property interests were held in suspension for 23 years from the filing of this lawsuit and then cancelled by the District Court's summary Order, recorded as McFarland v. Winnebago South, Inc., 863 F. Supp. 1025 (W.D.Mo. 1994).

Petitioner has no private legal recourse against the judicial system for deprivation of property or reputation. Her sole recourse is that of review by appellate courts of procedural and substantive errors made in abrogation of her right to a Seventh Amendment jury trial.

WHEREFORE, Petitioner prays this Court to grant her Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals to require it to fulfill its responsibility of overseeing actions of the district courts, and, at long last, do the right thing under the rule of law. This is Petitioner's court of last resort for confirmation that a rule of law does exist protecting Constitional Rights of all citizens in their pursuit of equal justice under the law.

Respectfully submitted,

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